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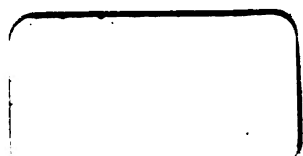
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REPORTS OF CASES

ARGUED AND RULED AT

NISI PRIUS,

IN THE

Courts of King's Bench & Common Pleas,

AND ON

The Circuit;

FROM

THE SITTINGS AFTER TRINITY TERM, 1827,

TO THE

SITTINGS AFTER EASTER TERM, 1829.

BY F. A. CARRINGTON & J. PAYNE, Esqrs.

OF LINCOLN'S INN, BARRISTERS AT LAW.

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CASES

AT

NISI PRIUS.

COURT OF KING'S BENCH.

*Adjourned Sittings in London, after Trinity
Term, 1827.*

BEFORE LORD TENTERDEN, C. J.

SENTANCE *v.* POOLE.

1827.
July 17th.

ASSUMPSIT by the plaintiff as indorsee, against the defendant, as one of the makers of a promissory note, which was in the following form:—

“ To Mr. William Carless,
High Street, Southwark. March 4th, 1826.

“ Sir,—We jointly and severally agree, five months after date, to pay to your order the sum of 220*l.* for value received.

£220.

John Cornish.

James Poole.

“ Payable at Garraway's Coffee-house,
'Change Alley, London.”

If a person, perfectly imbecile in mind, is imposed upon, and induced to sign a promissory note, which is drawn in an unusual form, such note is bad, even in the hands of an indorsee.

This note was indorsed, “ William Carless.”

It appeared, that when the defendant signed the note, it *was not addressed to any particular person as payee*, and that Cornish, the other maker, afterwards inserted the direction, “ To Mr. William Carless, High-Street,

1827.
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Southwark (a);" to whom he paid the note in part liquidation of a previous debt, due from himself, for the purchase of goods; and that Mr. Carless subsequently indorsed it to the plaintiff.

The witnesses for the defendant stated, that he had been wholly incapable of transacting the most ordinary affairs of life for some years past, and that at the time he signed the note he was of perfectly imbecile mind, and as helpless as a child four years old.

For the plaintiff, to shew a consideration, there was evidence given, that the plaintiff was accustomed to discount bills, and that he had given a check for the amount of the note in question, deducting only the discount; and it was contended by his counsel that he had acted *bond fide* in the transaction.

LORD TENTERDEN, C. J., (to the Jury).—The question in this case is, whether the defendant, John Poole, at the time he put his name to this note, which is drawn in an unusual form, it being "to your order," and not addressed to any one, was or was not conscious of what he

(a) If a bill or note be altered in a material part (though by consent of all parties), after it is issued, it requires a new stamp: and Mr. Justice Bayley lays down, (Bills of Exchange, 90), that "such alteration not only makes a new stamp necessary, but vacates the bill or note, (independently of the stamp laws), except as between the parties consenting to such alteration." In the case of *Kershaw v. Cox*, 3 Esp. 246, the words "or order" were omitted in the bill. This was discovered after the bill had been indorsed, and the words added by the drawer, with the consent of all parties. *Le Blanc, J.*, held, that the bill did not require a new stamp, as this was the

mere correction of a mistake, and was in furtherance of the original intention. But in the case of *Knill v. Williams*, 10 East, 431, the Court held, that an alteration of the term *value received*, by the addition of the words, *for the goodwill of the lease and trade of Mr. F. Knill, deceased*, was such an alteration as to require a new stamp, it being made after the issuing of the bill; *Le Blanc, J.*, saying, that his opinion in the case of *Kershaw v. Cox*, could only be supported on the ground, that the alteration there made was merely the correction of a mistake. See also the case of *Atwood v. Griffin*, ante, Vol. 2, p. 368.

was doing; for, if he was, there must be a verdict for the plaintiff; but, should you be satisfied that he was not conscious of what he was doing, and that he was imposed upon by reason of his imbecility of mind, you ought to find for the defendant. It is a hard case either way, but it is very important that Courts of justice should afford protection to those individuals who are unfortunately unable to be their own guardians.

1827.
SENTENCE
v.
POOLE.

Verdict for the defendant (*b*).

Marryatt and *C. Shepherd*, for the plaintiff.

Scarlett, A. G., and *Malkin*, for the defendant.

[Attornies—*Whiting* and *Brown*.]

(*b*) See the cases of *Barter v. Earl of Portsmouth*, ante, Vol. 2, p. 178, and 8 D. & R. 614; and the case of *Brown v. Jodrell*, post, p. 30. An agreement signed by a person in a state of complete intoxication, is void. *Pitt v. Smith*, 3 Camp. 33.

TRAIN v. BENNETT.

July 18th.

DEBT for seaman's wages. The first count of the declaration was special, and framed on the ship's articles, under seal, dated January 4th, 1823, between the defendant as owner, and the plaintiff and others as the master and crew of the whale ship, *Phoenix*. The declaration also contained the common money counts. Plea—*Nil debet* to the whole declaration.

If a seaman's claim for wages is resisted, on the ground that he would not do his work, which, by the ship's articles, is to cause a forfeiture of wages; it is a good answer to this defence, to shew that the refusal to work was caused by the misconduct of the captain,

The articles were read. They were executed by the defendant as owner, and by the plaintiff as a seaman of the *Phoenix*; and by these it was agreed that the plain-

which went to induce the men to incur such forfeitures.—If seamen have incurred a forfeiture of their wages, and, in a time of distress, when the ship is aground, the captain call on those seamen to assist in getting her off, this is no waiver of the forfeiture; but if the captain continues them in their work, after the peril is over, it is otherwise.

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tiff should act as a seaman on board the ship, which was to proceed to the Southern whale fishery, and receive a hundred and thirty-fifth share of the cargo. By one of the clauses of the articles, it was agreed that the seamen should forfeit their shares, in case they neglected their duty, or refused to obey the lawful commands of their superiors.

The defence was, that the plaintiff and several of the other seamen, repeatedly refused to work; and it appeared, that, on the voyage homeward, a man named Kebby, who did not wash a part of the ship as he ought to have done, was ordered to go below, and was not suffered to do his duty as usual; and it appeared that many of the other men refused to work unless Kebby was set to work also; and the captain said, that he would knock off several of them, (meaning that he would report them as disobedient, to deprive them of their shares of the cargo), but he did not say who in particular he would knock off. This occurred on the 7th October, 1826. However, a few days after this, the crew sent the captain the following letter:—

“ Sunday Morning, 16th.

“ We are willing to go to work, if you will turn Kebby to, or if you have no intention of knocking any one else off, or if you will tell us who they are. For an answer, we should be obliged to you.”

This letter was not signed; and the captain never gave any answer to it; and the plaintiff and the other men did no work, and were not ordered to do any for several weeks; by reason of which the captain, surgeon, and passengers all had to work occasionally at the pumps. However, subsequently to this, the ship ran aground near Margate, and the captain called on the plaintiff and the other seamen to assist in getting her off, which they did; and after this the plaintiff and the other seamen worked the ship into dock, which occupied a period of four days, during which the plaintiff and the other seamen did all their work as seamen on board the ship.

Scarlett, A. G., in his reply, contended, that, as the captain called the men up, and set them to work in a time of distress, and did not send them below again as soon as the distress was over, there was a dispensation of any previous forfeiture that might have occurred: and if it were not so, every man who was put in irons for half an hour, and then returned to his duty, would incur a forfeiture of his wages.

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LORD TENTERDEN, C. J., (in summing up to the Jury.)—In these fisheries, it is usual for the men to have certain shares of the net proceeds of the voyage to stimulate them to get as large a cargo as they can; and, by one of the clauses contained in the articles, it is here agreed, that if any of the officers, seamen, &c., shall break or neglect their engagements, one of which is, that they shall obey their superior officers, or, if they shall neglect their duty, they shall incur a forfeiture of their respective shares. Now it is here charged, that the plaintiff disobeyed the orders of the captain, and refused to do his duty. That he did not, in fact, do his duty, is quite clear. But this is answered on two grounds: *first*, that the captain acted improperly; and, *secondly*, that the captain set the plaintiff to work again, and kept him at work under such circumstances as waived any previous forfeiture. I take it to be clear, that when the ship had got aground, the captain might call for the assistance of the men to get her off, without any waiver of his owner's rights: but this case goes much further; for, after the ship is got off, he continues them in employ till the ship is got into dock. On the second ground, it appears, that the men sent the captain a letter, to which he returned no answer; and that he did not inform them whom he was going to knock off. Now, a master of a ship is not, by his own conduct, to induce a forfeiture of the men's wages; and if you think that the captain acted improperly in refusing to say whom he would knock off, or in obscurely saying that he would knock several of them off, and that the plaintiff

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and other men in consequence refused to work, I think that then, in point of law, the wages are not forfeited. But if you should think that the master did not act improperly, I am of opinion that you ought to find for the defendant.

Verdict for the plaintiff.—Damages, 43*l*.

Scarlett, A. G., and *Comyn*, for the plaintiff.

Gurney and *Steer*, for the defendant.

[Attornies.—*Jones & H.*, and *West & M.*]

“Desertion from the ship is held to be a forfeiture of wages previously earned, in all maritime states; and in conformity to this principle of maritime law, the Legislature of this country, in the reign of King William the Third, for the prevention of seamen deserting of ships abroad, enacted, (11 & 12 W. 3, c. 7.) ‘that all *such* seamen, officers, or sailors, who shall desert the ships or vessels wherein they are hired to serve for that voyage, shall, for such offence, forfeit all such wages as shall be due to him or them.’ And by the subsequent stat. (2 Geo. 2, c. 36), if a seaman shall desert or refuse to proceed on the voyage on board any ship bound to parts beyond the seas, or shall desert from the ship to which he belongs, *in parts beyond the seas*, after he shall have signed the contract, he shall forfeit to the owners the wages due to him at the time of his deserting or refusing to proceed on the voyage.”—*Abbott on Shipping*, 463. “It is, however, of great importance to understand, that the forfeiture of wages for desertion does not arise

out of these provisions of the Legislature, but depends, as I have already intimated, upon a general rule of maritime law.” *Id.* 468. It seems also that neglect of duty, disobedience of orders, habitual drunkenness, or any cause which will justify a master in discharging a seaman during a voyage, will also deprive the seaman of his wages. *Id.* 472. And in the case of *Robinett v. The Ship Exeter*, 2 Rob. Adm. Rep. 263, Sir W. Scott lays down, that drunkenness, neglect of duty, and disobedience in an officer of an Indiaman, are offences of a high nature, fully sufficient to justify his discharge, if proved; and that, “with respect to the negligence, it would not be necessary to shew that it was wilful; but that it would be sufficient, if it amounted to habitual inattention to the ordinary duties of his station, which might expose the ship to danger; for a person in the station of an officer stipulates against such negligence.” In the case of *Miller v. Brant*, 2 Camp. 590, the plaintiff, a seaman, had, under the articles, incurred a forfeiture of his wages by being absent without

leave; but it being proved, that on his return the captain took him again, and that he worked as the other men did, Lord *Ellenborough* held, that this waived the forfeiture, and said, that the captain might have refused to receive him, or, insisting on the forfeiture, have made a new agreement with him; but that, by permitting the plaintiff to return to work, he must be taken to have pardoned the offence, and could not afterwards revert to the forfeiture.

In the case of *Evans v. Bennett*, 1 Camp. 300, where the plaintiff had executed articles under seal, by which, in considera-

tion of his serving on board a South Sea whaler, the defendant, as the owner, was to pay him a share of the proceeds of the cargo: it was held, that to entitle him to recover on a count for money had and received, he must not only prove that the proceeds of the cargo came to the defendant's hands, but that the defendant had *acknowledged* that he had duly served, and was entitled to the share of the proceeds; and that if the plaintiff could not prove such an acknowledgment, his proper mode was to declare specially on the articles.

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COLBY and Others v. HUNTER, Esq., Secretary to The
St. Patrick's Assurance Company.

July 18th.

ASSUMPSIT on a policy of insurance on the ship, *Arethusa*, at and from Hamburgh to Vigo, and at and from thence to a port in the Mediterranean, &c. There was a count for money had and received. Plea—General Issue.

The loss by perils of the seas was admitted, and it was also admitted, that the policy was duly executed, that the defendant was the secretary of the Company, and that the plaintiffs were owners and had an interest.

The only question was, as to the meaning of the following warranty, "*warranted in port* on the 19th October, 1825."

The case as opened by the plaintiffs' counsel was, that there had been a great deal of bad weather, in the month of October, 1825, and that the underwriters therefore required a warranty that the ship was in port at the time mentioned. The ship was in fact at Cuxhaven, a place situate in the territory of the free town of Hamburgh; and the plaintiffs'

If a policy of insurance at and from H. to V. contain the following warranty, "*warranted in port* on the 19th October, 1825;" this warranty applies to the port of H. only, and not to any other port.

Cuxhaven is no part of the port of Hamburgh.

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counsel contended that the words, "warranted *in port*," did not of necessity mean the port of departure; and that, even if it did, evidence would be adduced to shew, that Cuxhaven was considered a part of the port of Hamburg. It was, no doubt, at some distance from the town; but still, if a vessel were warranted in the port of London, this warranty would be satisfied by the ship's lying at Gravesend (a). The amount of the loss claimed was 95*l.* 8*s.* 11*d.* if the plaintiffs' construction of the warranty was right; but if not, the plaintiffs went for a verdict for 30*l.* which was the amount of the premium, on the ground that, if the warranty was not complied with, the policy never attached, and they were entitled to a return of premium.

The admissions were read; and it was proved that the ship was at Cuxhaven from the 19th to the 24th of October.

To shew that Cuxhaven was a part of the port of Ham-

(a) Mr. Justice *Park* (*Law of Insurance*, 495) observes, that "in insurances at and from London, warranted to depart on or before a particular day, it has long been a question, what shall be a departure from the port of London, or rather what is the port of London? and it is singular, that this point has never yet been judicially determined. On the one hand, it is said, that the moment a ship is cleared out at the Custom House, and has all her cargo on board, if she quit her moorings in the river, on or before the day warranted, that the warranty is complied with. On the other side it is contended, with great appearance of reason, that a ship is not ready for sea, till she has got her Custom-House cocket on board, which is the final clearance, and which she cannot have till she arrive at Graves-

end; that till this cocket is received, the ship dare not proceed to sea, under a penalty, and till then is not entitled to the drawbacks; and that Gravesend is always considered as the limits of the port of London, and unless the ship sailed from thence, on or before the day limited, there is no inception of the voyage, and the policy is forfeited." But in the case of *Williams v. Marshall*, 6 Taunt. 390, it was held, that a ship was not to be considered as having "exported from the port of London," on clearing at the Custom House here, nor until she clears at Gravesend. Therefore, a licence to remain in force for the exportation of the cargo, till the 10th September, was not complied with, by clearing at the Custom-House, on the 9th, and at Gravesend on the 12th September.

burgh, a witness proved that Cuxhaven is situated at the mouth of the river Elbe, and is a part of the Hamburg territory; and that the port regulations of Hamburg extend to it; and that vessels do quarantine there; and that there is no separate custom-house at Cuxhaven, but the custom-house officers come there from Hamburg. However, on his cross-examination, he stated, that Cuxhaven is ninety miles distant from Hamburg, and that the two places are not continuously in the same territory, as a great deal of Hanoverian territory intervenes; and also that Luckstadt, a port belonging to the king of Denmark, is situated between Hamburg and Cuxhaven.

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Lord TENTERDEN, C. J.—I am of opinion that Cuxhaven is no part of Hamburg; and I am also of opinion, that, on the construction of this policy, which is, at and from Hamburg, the warranty applies to the port of Hamburg.

Parke cited the case of *Keyser v. Scott (a)*.

Lord TENTERDEN, C. J.—If this had been a warranty, “free from seizure in port,” and the ship had been a voyage, and had been seized at Cuxhaven, that might have been a seizure in port within the case cited; ships being, at the time of that decision, safer at sea than in port, as that case was decided at the time of the Northern seizures. The plaintiffs are, however, entitled to recover the amount of the premium.

Verdict for the plaintiffs, for the amount of the premium (*b*).

(a) 4 Taunt. 660.

(b) It is rather singular, considering the line of defence adopted, that the premium should not have been paid into Court; for if,

in *assumpsit* on a policy of insurance, with a count for money had and received, the defendant pay no money into Court, and establish, as a defence, that the risk

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*Scarlett, A. G., and Parke, for the plaintiffs.**F. Pollock and Justice, for the defendant.*[Attornies—*Butterfield, and White & B.*]

never commenced; the plaintiff 2 B. & P. 330. As to the propriety of paying money into Court on the count for money on *particular counts* only, see *ante*, Vol. 1, p. 20, n. (b).
had and received. *Penson v. Lee*,

July 19th.

CREER v. SODO.

If a party having failed and assigned his property to trustees for the benefit of his creditors, be sued for work done, a creditor of such party is not a competent witness in his favor, if he has not received 20s. in the pound on his debt, and swears that it is doubtful whether the estate will produce so much.

ASSUMPSIT for work and labour by the plaintiff, as an accountant. Plea—General Issue. A sum of 50*l.* had been paid into Court.

It appeared that the defendant, having failed in business, had assigned his effects to trustees, for the benefit of his creditors. The present action was brought by the plaintiff for business done by him for the defendant, before his failure. The plaintiff claimed 87*l.*; and the defendant's trustees (who defended the action) contended, that 30*l.* was an agreed price for part of the work; and that the sum paid into Court was therefore sufficient.

To prove this agreement for a sum of 30*l.* for part of the work, a witness was called, who was a creditor of the defendant; and he stated, that he had not been paid 20*s.* in the pound, and that it was doubtful whether the estate would yield that sum.

Campbell, for the plaintiff, objected that the witness was incompetent, as it was his interest to decrease the defendant's liabilities.

LORD TENTERDEN, C. J.—I think he is incompetent.

The defendant's counsel adduced other evidence, and there was a

Verdict for the defendant.

Campbell and *R. V. Richards*, for the plaintiffs.

Scarlett, A. G., and *Kelly*, for the defendant.

[Attornies—*Vansanden & T.*, and *Brutton*.]

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DANDRIDGE v. CORDEN.

July 26th.

ASSUMPSIT on a bill of exchange.

On the part of the plaintiff, a stock-broker was called to prove the discounting of the bill. He was asked by *Gurney*, for the defendant, whether the bill was accepted for a valuable consideration. He answered, that it was accepted for value received, but declined saying what the consideration was, as he might make himself liable to a *qui tam* action (a).

In an action on a bill of exchange, if a person, called to prove the consideration, say that the bill was accepted for value received, but refuse to say of what that value consisted, on the ground that it might render him liable to a *qui tam* action, he cannot be compelled to answer; but if he persist in refusing, it will stand upon the evidence that there was no consideration.

Gurney submitted, that the witness having answered in part, was bound to continue his evidence; and having said that the bill was accepted for value received, he was bound to explain of what that value consisted.

Lord TENTERDEN, C. J.—I cannot make him answer if he does not think proper. The effect of it will be, that if he does not state what the consideration was, it will stand as if there was no consideration at all (b).

Brougham and *Chitty*, for the plaintiff.

Gurney, for the defendant.

[Attornies—*W. O. Tucker*, and *Luchett*.]

(a) It was suggested, that the consideration was stock-jobbing differences.

(b) See the case of *East v. Chapman*, Vol. 2, p. 570, of these Reports.

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July 26th.

In an action of debt on a bond to secure the repayment of money with interest, the plaintiff can only recover to the amount of the penalty, with 1s. for detention of the debt.

HELLEN v. ARDLEY.

DEBT on a bond dated June 11th, 1788, in a penalty of 400*l.* to secure the repayment of 200*l.* with interest, at 5*l. per cent.* The damages were laid at 500*l.* Pleas—*Non est factum*, and payment. The cause was undefended.

It appeared that the plaintiff and defendant met at the office of an attorney on the 8th of July, 1826, examined into the state of the accounts between them, and signed a document in the following terms:—

“ We, the under-signed, Daniel Ardley, of Birch, in the county of Essex, farmer, and James Hellen of the same place, farmer, having this day examined the various outstanding and unsettled accounts hitherto subsisting between us, and balanced the same, do hereby mutually acknowledge and declare that the sum of 489*l.* 3*s.* 10½*d.* is now justly due and owing from the said Daniel Ardley to the said James Hellen, upon and by virtue of a certain bond, bearing date the 11th day of June, 1788, given by the said Daniel Ardley to the said James Hellen, for securing the payment of 200*l.* and interest, and that all other accounts and transactions between them have been settled, adjusted, and balanced; and that neither of them, the said Daniel Ardley and James Hellen, have any other claim or demand whatever against each other, than and except the said sum of 489*l.* 3*s.* 10½*d.* so due from the said Daniel Ardley upon the said bond. As witness our hands, this 8th day of July, 1826.”

(Witness) Edger Church.
Ellis Wring.

(Signed) D. Ardley.
James Hellen.”

F. Pollock, for the plaintiff, submitted, that, on the authority of this document, he was entitled to recover the sum mentioned in it, instead of the penalty of the bond, and as shilling as damages for the detention of the debt.

Lord TENTERDEN, C. J.—You cannot have more than the penalty.

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Starkie, for the plaintiff, mentioned the cases of Lord *Lonsdale v. Church* (a), and *Eastmond v. Hall* (b).

Lord TENTERDEN, C. J.—My present opinion is, that you can only have damages to the amount of 1s., for the detention. But you may move to increase the damages, if you find, on looking into the authorities, that you can support such a motion.

Verdict for the plaintiff—Damages, 1s.

F. Pollock and *Starkie*, for the plaintiff.

[Attornies—*Peachey*, and *Hanson*.]

(a) 2 T. R. 338.

(b) 3 Price, 219.

In the case of *Elliott v. Davis*, Bunb. 23, interest on a bond was decreed, though beyond the penalty: and in *Hardres*, 136, the same course was followed; and in *Holdipp v. Otway*, 2 Saund. 106, a sum of 50l. was given as damages in an action of debt on a bill obligatory for 68l.; but in the case of *Steward v. Rumball*, 2 Vern. 509, Lord Keeper *Wright* held, that a party could not go beyond the penalty of the bond. In *Brangwin v. Perrott*, 2 Black. 1190, (Elsley's Ed.), and *White v. Sealey*, Doug. 49, the Court held that the plaintiff could not recover interest on a bond beyond the penalty. However, in the case of Lord *Lonsdale v. Church*, 2 T. R. 388, Mr. Justice *Buller* laid down, that interest beyond the penalty of a bond might be recovered in a Court of law in the shape of damages; but that decision appears

to be over-ruled, and the contrary doctrine, viz.—that upon a bond for the payment of a sum of money with interest, the plaintiff cannot recover more than the penalty of the bond, was laid down in the following cases:—*Wild v. Clarkson*, 6 T. R. 303; *Gibson v. Egerton*, Dick. 409; *Kettleby v. Kettleby*, Id. 519; *T'ew v. Earl of Winterton*, 3 Bro. C. C. 489; *Knight v. Maclean*, Id. 496. And in the case of *Clark v. Seton*, 5 Ves. 415, Sir *W. Grant*, M. R., says, “I take it to be perfectly ascertained at this day, that the penalty of the bond is the debt; and the uniform rule in equity is, never to go beyond the penalty. In Lord *Lonsdale v. Church*, Mr. Justice *Buller* said, the old cases were not founded upon principle, and that at law the penalty is not to be considered the debt, but interest in the shape of damages may be recovered beyond the penalty. If that was established to be so at

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law; I should think it would almost have followed, that, in equity, interest should be calculated in the same manner; and accordingly Mr. Justice Buller did not conceive that there would be any difference in that respect at law and in equity; for in *Knight v. Maclean*, sitting in this Court, he held, that in equity the interest ought to go beyond the penalty; Lord Thurlow dissented from that, and decided accordingly, both in *Tew v. Lord Winterton*, and *Knight v. Maclean*; and in *Wild v. Clarkson*, the Court of King's Bench dissented entirely from the case of Lord Lonsdale v. Church; and in *M'Clure v. Dunkin*, 1 Ea. 436, Lord Kenyon was quite clear, that if the action had been upon the bond, nothing more could have been recovered than the penalty; but the action being upon a judgment, it was determined that the plaintiff might go beyond the penalty. It is clear, therefore, that both at law and in equity the penalty is the debt." However, his Honour appears to consider, that, under very special circumstances, a Court of equity might go beyond the penalty.

The case of *M'Clure v. Dunkin*, 1 East, 436, was an action on an Irish judgment; and the Court held, that this being an action on a judgment, it was competent to the Jury to allow interest to the amount of what was due, although it exceeded the penalty of the bond on which the action was originally brought; and that in this respect there was no difference between a foreign judgment, and a judgment in a Court of re-

cord here. However, in the case of *Deschamps v. Vassuech*, 2 Ves. jun. 719, Lord Eldon, C. says, "I had a clear opinion on this question, but I have made inquiry, and find, that all the Masters allow no interest on a judgment. I have also found, upon inquiry, that no interest is computed upon a judgment in an action upon a judgment at law."

In equity, interest beyond the penalty of the bond was allowed to a judgment creditor, trustee in possession, under the will of his debtor, and as such applying the whole of the rents in the discharge of other debts, and not retaining any part for his own debt. *Atkinson v. Atkinson*, 1 Ball & Bea. 238. So, if the party be by injunction prevented from recovering his debt at law, while the demand was under the penalty; *Duwall v. Terry*, Show. P. C. 15; 6 Ves. 79; or if an *elegit* creditor be called to an account in equity, the principal and interest may be recovered, although the interest carries the debt beyond the penalty. These instances are exceptions to the rule in equity, that a party shall not, in the Master's office, be allowed interest beyond the penalty, against the assets of a deceased debtor. 1 Ball & Bea. 239. Where a bond is only a collateral security, interest may be carried beyond the penalty, *Kerwin v. Blake*, 14 Vin. Abr. 460, pl. 4. So, interest will be given beyond the penalty of a bond, upon a mortgage for the same debt, though by a surety. *Clarke v. Lord Abingdon*, 17 Ves. 106. (See *Lloyd v.*

Hatchett, 2 Anstr. 527, *contra*). Therefore, if a bond creditor also takes a promissory note with interest, he may recover interest beyond the penalty of the bond. 2 Ves. jun. 718. So, if an obligor goes into a Court of equity for relief as plaintiff, although he submits to nothing, yet, by the mere circumstance of filing the bill, he would be taken to submit to every thing conscience and justice require: and upon that principle, before granting the relief prayed for, the Court would compel him to pay the principal, interest, and costs occasioned by

his delay. *Pulteney v. Warren*, 6 Ves. 92. But equity will never carry interest beyond the penalty, where there has been no demand for many years. *Galway v. Russell*, 14 Vin. Abr. 460, pl. 2.

The most recent case upon the subject is that of *Eastmond v. Holl*, 3 Price, 219, where the plaintiff had obtained a verdict in debt on bond for the principal and interest, which exceeded the penalty; and the Court there refused to refer it to the Master to take an account of what was actually due, on the ground that the application was made too late.

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Adjourned Sittings in London, after Trinity Term, 1827.

CLIFFORD v. LATON, Esq.

Oct. 16th.

GOODS sold and delivered. Plea—General Issue.

It appeared that the plaintiff, who was a linen draper, had supplied goods to the wife of the defendant, Colonel Laton, to the amount of 51*l.*, but that Mrs. Laton had, for some years, lived separate and apart from her husband. It was also proved, that, after the separation, Colonel Laton's father allowed Mrs. Laton 120*l.* a-year, but that on her becoming entitled to an annuity of about 200*l.* a-year, in her own right, this allowance by the Colonel's father was discontinued.

If an action is brought against a husband, for the price of goods supplied to his wife, who is living with him, it lies on the husband to shew, that the goods were furnished under such circumstances that he is not liable to pay for them.

But if the goods be supplied to his wife, when she is living *separate and apart* from the husband, it is incumbent on the tradesman to prove that the separation occurred under such circumstances as will make the husband liable.

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LORD TENTERDEN, C. J.—If goods are furnished to a married woman who is living with her husband, it must be taken, *prima facie*, that those goods are supplied to her by his authority, and it lies on the husband to shew that the goods were supplied under such circumstances as make him not liable to pay for them. But if a married woman be living separate and apart from her husband, it is the duty of tradesmen to inquire under what circumstances the separation took place, before they part with their goods; and if a tradesman do part with his goods to a woman living apart from her husband, the *onus* lies on him to prove, that the separation took place under such circumstances as will entitle him to recover the price of those goods against the husband. There is no such proof here, and if a tradesman will trust any woman that comes into his shop, he must do so at his peril.

Verdict for the defendant.

Gurney and ——— for the plaintiff.

Scarlett, A. G., and Brodrick, for the defendant.

[Attornies—T. N. Williams, and Weymouth.]

See the case of *Montague v. Es-* and also *Houlston v. Smith, ante*,
pinasse, Esq. ante, Vol. 1, p. 356, Vol. 2, p. 22; *Mainwaring v. Les-*
502; and 5 D. & R. 532; and *lie*, Id. 507; and *Hindley v. Mar-*
the authorities there mentioned; quis of *Westmeath*, 6 B. & C. 200.

Oct. 17th.

The question, whether a ship, on a voyage from Madras to London is not seaworthy, if she have no person on board her besides the captain who is capable of navigat-

ing her, is a question of fact for the Jury, and not a question of law to be determined by the Judge.

If the plaintiff's counsel, call "Captain S." and Captain Hugh S. answer, and is sworn, and the plaintiff's counsel, after asking him a few questions, ascertain that it was Captain Francis S. whom they meant to examine, this does not give the other side a right to cross-examine Captain Hugh S. as he was only examined by mistake.

CLIFFORD v. HUNTER.

ASSUMPSIT on a policy of insurance on goods on board the ship, Holly Latchamy, at and from Madras or Columbo, and from thence to London. The loss was by peril of the seas. Plea—General Issue.

The plaintiff's counsel called "Captain Stewart," and Captain Hugh Stewart answered, and was sworn; and af-

ter the plaintiff's counsel had put three questions to him, they ascertained that he was not the Captain Stewart they wanted, and they declined asking him any thing further.

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Scarlett, A. G., submitted, that as the plaintiff's counsel had asked questions of the witness, he had a right to cross-examine him; and he cited the case of *Phillips v. Eamer* (a).

Lord TENTERDEN, C. J.—As this witness was called by mistake, he cannot be cross-examined. In the case cited, there was no mistake as to the person called as a witness.

"Captain Stewart" was again called, when Captain Francis Stewart answering, he was sworn and examined.

The only material question in the cause was, whether the ship was sea-worthy: and to shew that she was not, it was proved, by the cross-examination of the plaintiff's witnesses, that there was no person on board, capable of navigating her to England, except the Captain.

Scarlett, A. G.—I submit that the plaintiff must be called. The ship was not sea-worthy, because the captain was the only person on board who was capable of navigating her. The owners were bound to send out a sufficient number of competent persons; so that, if the captain either became sick, or died, there might be some one else able to navigate the ship. I submit that it was their bounden duty, especially on a voyage of this length, to have at least one other person besides the captain, who could na-

(a) 1 Esp. N. P. C. 357. There, Lord *Kenyon* held, that if a witness was called, the opposite party had a right to cross-examine him, though the counsel who had called him, had put no question to him in chief.

at *Guildhall*, that counsel will call a witness, but, before he is sworn, will tell him that he is not wanted; and in such cases, the person so called, is, in point of practice, never cross-examined by the opposite party.

However, it frequently happens

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vigate the ship, in case of his illness or death; and as they had not, the ship was not sea-worthy.

Lord TENTERDEN, C. J.—The question is, whether a ship is capable of an India voyage, with no one on board capable of taking the command except the captain. I certainly think not; but I must leave it to the Jury, as it appears to me to be a question of fact and not of law. It is quite clear, that a ship cannot be deemed sea-worthy, unless she has on board her a captain and crew competent to the voyage she has to perform; and if the Jury shall be of opinion that she ought to have had on board her another person besides the captain, capable of taking the command in case of his illness or death, then the defendant is entitled to a verdict (*b*).

The Jury were of that opinion, and found a

Verdict for the defendant.

Gurney, E. Lawes, Serjts., and Parke, for the plaintiff.

Scarlett, A. G., and Campbell, for the defendant.

[Attornies—*Clark & F.*, and *Oliverson & D.*]

(*b*) On the subject of sea-worthiness, Lord *Kenyon* lays down, in the case of *Law v. Hollingsworth*, 7 T. R. 161, “that the assured cannot recover on a policy of assurance, unless they equip the ship with every thing necessary to her navigation during the voyage. The

ship herself must be sea-worthy, she must have a sufficient crew, and a captain and pilot of competent skill.” The ship in that case was lost in the Thames, having no pilot on board: and it was held, that the plaintiffs could not recover on the policy.

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VICE *v.* Dowager Viscountess ANSON.

Oct. 17th.

DEBT for work and labour. Plea—*Nil debet*. The plaintiff was a person in the habit of supplying coal, iron, and timber for the use of mines; and he now sought to charge the defendant as a shareholder in certain mines, called the Wheal Concord mine, and the Wheal Prudence mine, with the price of certain goods furnished by him for the use of those mines.

A lady named Blackwell, was called, she stated that she was a relation of Lady Anson, and that she was served with a subpoena to attend this trial as a witness, on the part of the plaintiff, in August last, she being then in London, but on the eve of going abroad; and that having gone abroad, she had come from Boulogne on purpose to attend the trial: she therefore asked for her expenses in coming from Boulogne.

LORD TENTERDEN, C. J.—I think the witness is entitled to be paid her expenses incurred in coming from Boulogne; you cannot expect a witness to remain in London from the beginning of August, merely to wait for the trial of a cause in October.

Fifteen pounds were paid to the witness, and she was examined; she stated, that she had heard from Lady Anson, that she had bought shares in the Wheal Concord and Wheal Prudence Mining Companies, as the witness herself had done; and that they had bought these shares through a Mr. Alderson, who was called the Treasurer of the Company; but that they had no deeds or any thing to give them a title to any part of the mines, except certain pieces of parchment. In her cross-examination she said, that she had no reason to believe that Lady Anson had attended

If a person purchase certain parchments, purporting to be share certificates of a certain mine, and conceives himself to be a shareholder in such mine: if it appear that those parchments gave no legal interest in the mine, such person is not liable to pay for goods furnished for the working of such mine, unless they were furnished on his personal credit.

A witness who is subpoenaed in London in August, to attend a trial at the adjourned sittings in October, and who is at the time of the service on the eve of his departure for the continent, is entitled to his expenses in coming from the continent to attend the trial.

Notice served on the attorney at 9 o'clock on Saturday night to produce papers at a trial in London on Wednesday, his client being absent in Scotland, is too late.

The rule that all papers relating

to the cause must be presumed to be put into the hands of the attorney, must be confined to the attorney of persons residing abroad while the cause is going on in England, and does not apply to cases where the party is resident in England; and in no case does it extend to any but such papers as might be reasonably expected to be put into the hands of the attorney for the purposes of the cause.

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any meeting, or done any act respecting the mines, except paying her money for these parchments.

One of the parchments alluded to was put in, it was in the following form:—

“Wheal Concord Tin and Copper Mine Company.
“No. 133.

“These are to certify that the Viscountess Dowager Anson is a proprietor of the share or number 133; being one share of the Wheal Concord mine, situate in the parish of St. Agnes, in the county of Cornwall; and that her name is duly registered in the cost book of the said mine, subject to the rules, regulations, and orders, of the said Company; and that the said Viscountess Dowager Anson, her executors, administrators, and assigns, are entitled to the profits and advantages of such share.

“ (By order of the Directors),

“As witness my hand this 14th day of June, in the
year of our Lord, 1822.

Chris. Vaux,

“500 Shares.

Secretary to the said mine.”

“Established 1822.”

“This share is not transferrable without the consent of the Directors, and a record thereof being made in the Company's books.”

A letter of Lady Anson, written to a person named Denham, was put in; and in this letter she spoke of the money her shares in these mines would have produced; and complained that the shares were likely to be unprofitable to her, by reason of the total number of shares in the concern being increased.

Mr. Alderson, the late treasurer of the Company, was called to produce Lady Anson's letters to him; but he stated that he had returned them to her Ladyship.

Notice to produce them had been served on her Ladyship's attorney, (she being in Scotland), at nine o'clock in the evening of the Saturday previous to the trial, (which took place on a Wednesday).

It was conceded, that the defendant's attornies could have had no communication with her Ladyship after this notice to produce. But the plaintiff's counsel relied upon the case of *Bryan v. Wagstaff* (a), and contended, that these letters must be presumed to be in the hands of her Ladyship's attornies.

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Lord TENTERDEN, C. J.—I feel no doubt as to that case, and I should decide so again; all papers relating to the transaction must be expected to be put into the hands of an attorney, who was to conduct the case for one residing abroad: but I am not sure that I should say that it would be so if the party were resident here; and I would always confine it to papers which would be reasonably expected to be put into the hands of the attorney, with a view to the conduct of the cause; and I do not think that Lady Anson's letters to Mr. Alderson are papers of that kind. I don't think that the notice is sufficient.

Mr. Alderson in answer to further questions stated, that her Ladyship resided in May-fair, London.

Lord TENTERDEN, C. J.—Private papers in her house in London, cannot be within the reach of her attorney.

Mr. Alderson in his cross-examination stated, that the mines in question were in the possession of a person named Thomas, who was spoken of as the lessee of them.

Scarlett, A. G., for the defendant.—If the question was, whether Lady Anson *thought* she had an interest in the mines the case would be clear against her, as undoubtedly she did think so, but that is not the question. The thing that must be shewn here, is, that she had an interest in these mines. It is proved that a person named Thomas

(a) *Ante*, Vol. 2, p. 125. See also *Drabble v. Donner*, *ante*, Vol. 1, p. 188.

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was in possession of the mines, and professed to have a lease of them. I take it, that he says, he will assign the mines to a number of persons, still, he never in fact does so; and the most that appears, is, that some person, named Vaux, has signed and issued certain parchments in a form that has been produced. The only way in which Lady Anson, could have any right in the mines, was, by her executing some deed, or having an assignment executed to her. These shares are sold every week from A. to B. and from B. to C., and if the possession of these parchments made the party liable, the plaintiff would have to sue every one of the persons for the week during which he was the holder of the parchments. These parchments at most only amount to an undertaking to give a share, but it is quite clear that they will give the holder no title to the mine or any part of it.

Lord TENTERDEN, C. J. (to the Jury).—In this case it does not appear that at the time the plaintiff supplied the goods, he knew, or had any reason to believe, that the defendant had any interest or concern in these mines; therefore, there was not a supply on her credit. As Lady Anson has never held herself out to the world as a partner in the mines, it only remains to consider, whether she was in reality a partner in them. These goods, it should be observed, were for mines; and, therefore, this was, if anything, a partnership relating to real property, and not to personal property only. It is clear, that Lady Anson considered herself to be a partner; but if she was really not so, that will not prejudice her, especially as it was never communicated to the plaintiff. The history of these mines is in considerable obscurity, but it seems that a person named Thomas had the management of them; one of the witnesses calls him a lessee, but the exact nature of his interest does not appear. Then, did he communicate any interest to Lady Anson. If he himself had none, he could not give her any; and, besides his name does not appear

in the parchment; nor is it shewn to have been issued by his authority: and if Lady Anson had sued Mr. Thomas for the profits, a great deal more must have been shewn than is disclosed by this parchment, before she would be entitled to recover. The parchment is signed Christ. Vaux, and is stated to be signed by order of the directors; but who those directors are does not appear, nor what right they had to issue this parchment, nor does it appear who Christ. Vaux is. Under these circumstances, you are to say, whether it is made out that Lady Anson has an interest in the mines. I own that, upon this evidence, I think she has none.

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F. Pollock, for the plaintiff.—Will not your Lordship reserve the point.

LORD TENTERDEN, C. J.—I feel no doubt about it, and it is not usual for a Judge to reserve a point, unless he feels some doubt. However, you have a right to be nonsuited, if you don't wish to have a verdict against you.

The plaintiff's counsel elected to be

Nonsuited.

F. Pollock and *Chitty*, for the plaintiff.

Scarlett, A. G. and *Brougham*, for the defendant.

[Attornies—*Tilleard*, and *Anderton & W.*]

BEFORE LORD TENTERDEN, C. J., BAYLEY, HOLROYD, &
 LITLEDALE, JS. — In Bank.

F. Pollock now moved to set aside the nonsuit, and contended, that mining adventurers have no title in the land, but only a license to work; *Doe dem. Hanley v. Wood (a)*. And he submitted, that, although the Lord Chief Justice at the trial had held, that unless Lady Anson had a legal

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interest in something connected with the freehold, it would not be sufficient; yet it was enough to shew that she was one of the adventurers, contributing funds, and looking for profits.

BAYLEY, J.—The rule of law is this, you must either prove that the party held himself out to the world as a partner, or that he really was so.

F. Pollock.—It was considered, that there must be such a conveyance as would give an interest in land. Now the evidence shewed that there was an adventure, and that Lady Anson was a partner. In her letter, she speaks of her shares.

Lord TENTERDEN, C. J.—What she calls her shares were produced, and they are not shares.

F. Pollock.—Mines are in more numerous shares than ships, and what would be better evidence against a partner, than a letter to the ship's husband, by a party speaking of his shares in the ship. It was, I submit, proved, that Lady Anson had bought shares.

BAYLEY, J.—If the letter had been written to your client, she would have held herself out as a partner, and you would have had a right to charge her; but this is a private letter to a third party.

F. Pollock.—If Lady Anson had said to any one, that she had shares, and was reluctant to have the number of shares in the concern increased: would it not then lie on her to shew what her interest was? She could call Mr. Vaux, and shew that he had no authority to issue the shares. How much fairer is it, that the proof should be on the defendant? She has the possession of the shares, and about these shares she corresponds with Mr. Alderson;

should it not be taken as against her, that the parchment is a good share; and should it not be taken that she has inquired into its validity, and found it good. I submit it is upon Lady Anson to prove that she has no share. The plaintiff deals with the adventurers, and he ought not to be tied down to the strictest proof.

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BAYLEY, J.—Suppose Thomas to be a lessee, and that the shareholders are to have a portion of the royalty, would they be liable for the materials?

F. Pollock.—Certainly not, my Lord; but the presumption is, that the persons liable are those who are sharers in the indefinite profits; and I therefore submit that this is a fit case to go to another trial.

Lord TENTERDEN, C. J. (after having stated the evidence.)—At the trial, I took a distinction between a partnership relating to real property, and one relating to trade. Taking Lady Anson's letter *alone*, it speaks of shares, but then it refers to the shares themselves, which do not shew the slightest authority in those who issued them, and there was nothing to shew that Lady Anson had any legal interest whatever in the mine.

BAYLEY, J.—Lady Anson considered herself interested in this mine, and had pieces of parchment which, when produced, do not shew any right. Now, where you want to charge a party, it is because he has an interest, and not merely because he fancies so. You might have called the persons who actually carried on the mine, and they could have shewn for whom all this was done.

HOLROYD and LITLEDALE, Js. concurred.

Rule refused (*a*).

(*a*) See the case of *Rex v. Mott*, *ante*, Vol. 2, p. 511.

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*Adjourned Sittings at Westminster, after Trinity
Term, 1827.*

Oct. 29th.

Lord Viscount DUDLEY and WARD v. ROBINS.

If, when a written agreement is put in, the opposite party object that it contains a greater number of words than the stamp is proper for, and call a witness who has counted the words in the counterpart: the Judge will direct the officer of the Court to count the words in the original.

Figures are to be counted as words, but an indorsement on the back, and a page of the particulars of sale, containing mere repetition of the description of the property, which was described in another page of the same particulars, are not to be counted.

The Judge will not call on another cause, to allow the agreement to be sent to the Stamp Office, to be properly stamped, and the plaintiff must therefore be consulted,

ASSUMPSIT to recover back a deposit made on the purchase of an estate in Shropshire.

The first count of the declaration was on a written agreement, by which, in consideration of 6000*l.* paid by the plaintiff, he agreed to purchase, and the defendant to sell the manor and estate therein described, at 47,350*l.* subject to annexed conditions of sale, and the defendant agreed to make out a good title before Christmas then next ensuing. The breach was in not making out a good title. Plea.—General Issue.

The written agreement was put in, it was written on the back of a printed particular of sale, which contained also the conditions of sale.

Campbell, for the defendant.—This agreement, bears a 1*l.* 15*s.* stamp, and two stamps of 1*l.* 5*s.* I am prepared to shew, that it contains seventy folios, and by the stat. 55 Geo. 3, c. 184, the stamp on every agreement is, “where the same shall not contain more than 1080 words, (being the amount of fifteen common law folios, or sheets of seventy-two words each) 1*l.*; and where the same shall contain more than 1080 words, 1*l.* 15*s.*; and for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of 1*l.* 5*s.*” Therefore, if this agreement contains not more than thrice 1080 words, it would be right; now I am informed, that it contains more than four times that number.

A witness was called, on the part of the defendant, who

stated, that he had counted the counterpart, and that it contained more than four times 1080 words (a).

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Scarlett, A. G.—Counting that, does not prove how many words the original may contain.

Lord TENTERDEN, C. J.—As reasonable evidence is given, that it does contain more than three times 1080 words, I shall wait till the officer of the Court, Mr. Bellamy, has counted the words in the original agreement.

Scarlett, A. G.—I submit that the first page of the particular of sale, which is a mere title-page, and also that the indorsement, ought not to be counted.

Lord TENTERDEN, C. J.—I must take either the first page or the third, as, without one of them, there is no mention of the manor. The Attorney-General may insist on the words being counted, and I shall direct Mr. Bellamy to count the words, omitting the third page, and the indorsement.

Mr. Bellamy.—My Lord, are figures to be counted as words?

Lord TENTERDEN, C. J.—Yes. I shall call another cause, while Mr. Bellamy counts.

Scarlett, A. G.—If your Lordship will call another cause, we can send to the Stamp Office, and get it properly stamped. This objection is a great hardship on the plaintiff, as the paper has had the present stamps put on it at the Stamp Office, upon payment of the penalty.

Lord TENTERDEN, C. J.—I remember my Lord Ken-

(a) See the case of *Bowring v. Stevens*, ante, Vol. 2, p. 337.

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yon once stating, that when in a cause it was discovered that a paper was not duly stamped, his Lordship called on another cause to allow it to be stamped.

Campbell.—My Lord, that was a solitary instance one way, against a thousand instances the other; for, if that were to be the practice, there never would be a nonsuit for want of a proper stamp, in either London or Middlesex; because, if the learned Judge would allow another cause to be called, the proper stamp might always be affixed.

Lord TENTERDEN, C. J.—I must not allow this paper to be stamped, by stopping the cause, it is too dangerous a precedent.

The plaintiff's counsel did not insist on the words being counted by the officer of the Court, and the plaintiff was

Nonsuited.

Scarlett, A. G. Brougham, C. F. Williams, and Kelly,
 for the plaintiff.

Campbell and Abraham, for the defendant.

[Attornies—*Benbow & Co.* and *Lys.*]

In the ensuing Term, the Court granted a new trial, it appearing by the affidavits of three witnesses, that the person called at the trial had miscounted the number of words, and that there were not in fact so many as three times 1080 words.

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Oct 29th.

BERNASCONI and Others, Assignees of CHAMBERS and Others, Bankrupts, v. The Duke of ARGYLE.

ASSUMPSIT on two bills of exchange, drawn by Mr. John Ebers on the defendant, and accepted by him. The plaintiffs sued as the surviving assignees of Chambers & Co. who had become bankrupt; and the declaration stated that the bills were indorsed after the bankruptcy to the plaintiffs, as the surviving assignees of Chambers & Co.

A witness proved the handwriting of Mr. Ebers and of the Duke of Argyle to the acceptance and indorsement; and the commission of bankrupt against Chambers & Co. and the proceedings thereon were put in.

If a declaration on a bill of exchange, indorsee against acceptor, state that it was indorsed to the plaintiffs as the surviving assignees of A. B. after his bankruptcy; the plaintiffs must prove that the bill was indorsed to them after the bankruptcy, and in their capacity of surviving assignees.

Lord TENTERDEN, C. J.—You have no proof that these bills were indorsed to the plaintiffs as surviving assignees. If you had declared generally in the names of the plaintiffs, the possession of the bills by them would have done, but here you state specially that they were indorsed after the bankruptcy to them, as surviving assignees, and you have given no evidence of either of those circumstances.

Hutchinson.—The bills are dated after the bankruptcy.

Lord TENTERDEN, C. J.—That alters the case, but you must still shew the plaintiffs to be surviving assignees, and that the bills were indorsed to them as such.

The death of a person named Fawcet, who was one of the assignees, was proved to have occurred before the date of the bills; and the witness who proved the handwriting, stated that they were indorsed to the plaintiffs, as the surviving assignees of Messrs Chambers, in part of the rent of the King's Theatre.

Lord TENTERDEN, C. J., directed a

Verdict for the plaintiffs.

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Scarlett, A. G. and Hutchinson for the plaintiffs.

BERNASCONI

v.
Duke of
ARGYLE.[Attornies—*Mayhew*, and *Hicks & B.*]

Oct. 30th.

BROWN v. JODRELL, Esq.

No person can, in defending an action, be allowed to stultify himself: and therefore, a defendant cannot, in an action for work and labour, set up his own insanity as a defence, unless he has been imposed upon by the plaintiff in consequence of his mental imbecility.

ASSUMPSIT for work and labour. Plea—General Issue. The plaintiff sought to recover for the value of certain work done by him, in rooms belonging to a society called the Athenaeon, of which the defendant was the chairman. A resolution of the society, signed by the defendant as chairman, directing the work to be done, was put in; and it was also proved that the defendant saw the work going on, and gave directions about it while in progress.

Gurney, for the defendant, opened—That he was in a condition to prove his client insane from the year 1822.

Lord TENTERDEN, C. J.—I think that this defence cannot be allowed, and that no person can be suffered to stultify himself, and to set up his own lunacy as a defence. If, indeed, it can be shewn that the defendant has been imposed upon by the plaintiff, in consequence of his mental imbecility, it might be otherwise, and such a defence might be admitted.

Gurney, for the defendant, admitted that no fraud could be imputed to the plaintiff.

Verdict for the plaintiff.

Scarlett, A. G., and Comyn, for the plaintiff.

Gurney, Presland, and Abraham, for the defendant.

[Attornies—*Rogers & Son*, and *Slaney*.]

See the case of *Faulder v. Silk*, 3 Camp. 126, where, to an action of debt on bond, the executors of the obligor having pleaded *non est factum*, went into evidence of his insanity. The bond was dated

28 July, 1808, and they offered in evidence an inquisition taken under a commission of lunacy, which found him a lunatic without any lucid interval from February, 1808. It was objected, that this was *res inter alios acta*; but Lord *Ellenborough* held it to be

admissible in evidence, though by no means conclusive. On the subject of lunacy, see the cases of *Barter v. Earl of Portsmouth*, *ante*, Vol. 2, p. 178, and the notes to that case; *S. C. 7 D. & R. 614*; and *Sentance v. Pool*, *ante*, p. 1.

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REX v. MITTON.

Nov. 1st.

INFORMATION by the Attorney-General against the defendant, for assaulting Thomas Dean, an officer of excise, in the execution of his duty. It appeared that the defendant kept the Northumberland Arms public house at Pentonville, and that Dean and other excise officers had a warrant to search his house for a private still; no still was found in the house; and when the officers had completed their search, the defendant asked for the warrant. It was given to him by Dean; and the defendant said, "I suppose it is of no further use to you, as you have gone all over my premises." Dean replied, "Keep it at your peril." The defendant then put the warrant into his pocket, when the officers seized hold of him, and in attempting to get possession of the warrant, pushed the defendant's back against the counter in his bar, when he took up a pewter pot, and gave Dean a blow on the head with it; and the defendant ultimately kept possession of the warrant.

Excise Officers went with a search warrant, and at the desire of the party gave it to him for his perusal, when he refused to return it:—Held, that they had a right to take it from him, and even to coerce his person to obtain the possession of it, provided they used no more violence than was necessary.

Jones, Serjt, for the defendant, admitted, that the defendant had no right to keep the possession of the warrant, but contended, that the officers, by pushing the defendant against the bar, had committed the first assault.

Lord *TENTERDEN*, C. J., (to the Jury.)—It is conceded on all hands, that the defendant had no right to keep the warrant; and that being so, the officers had a right to

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take it from him, and even to coerce his person to obtain the possession of it, provided that, in so doing, they used no more violence than was necessary. The question therefore is, whether in this case the officers used more violence than was necessary to get back the warrant; for if they did not, the defendant had no right to strike them.

Verdict—Not Guilty.

Scarlett, A. G., Tindal, S. G., J. Williams, and Parke,
 for the Crown.

Jones, Serjt., and Brodrick, for the defendant.

[Attornies—*Mayow, and Molloy.*]

Nov. 5th.

BAKER v. BERKELEY, Esq.

If a person who keeps hounds and a hunting establishment, receive notice not to trespass on the lands of A., and after this his hounds go out, followed by a number of gentlemen who go upon the lands of A., the owner of the hounds is answerable for all the damage they do, though he himself forbear to go on the lands, unless he distinctly desires the gentlemen so out with his hounds not to go on those lands.

If a stag, hunted by the hounds of B. run into the barn of A., B. and his servants have no right to enter the barn to take his stag; and if they do so they are trespassers.

TRESPASS *quare clausum fregit*, with a count for an assault. Plea, to the whole declaration—Not Guilty.

It appeared, that the plaintiff occupied a farm near Harrow on the Hill, and that the defendant, the Honourable Grantley Berkeley, had, in the year 1824, received a notice not to trespass on the plaintiff's lands. It was also proved, that the defendant kept stag-hounds, and employed a huntsman, &c.; and that on the 31st of December, 1826, a considerable number of persons, who were hunting with the defendant's hounds, went over the plaintiff's lands, doing damage to the fences and grass to the value of about 23*l*. It did not appear that the defendant himself went on the plaintiff's lands; and some evidence was given to shew, that he rode along a road to avoid doing so. It further appeared, that the stag, which the defendant's hounds were hunting, ran into the plaintiff's barn, followed by six couple of the stag hounds; and that the plaintiff shut the barn doors, and would not suffer the defendant or his servants to go into his barn to rescue the stag from the hounds, which was in consequence so much worried, that it died in about a quarter of an hour after. It was also proved that, in attempting to get to the barn, the defendant gave the plaintiff a blow.

Brougham, for the defendant, contended, that as the defendant did not himself go on the plaintiff's lands, he was not liable for the 23*l.* claimed for injury to the fences and grass.

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 BERKELEY.

LORD TENTERDEN, C. J.—If a gentleman sends out his hounds and his servants, and invites other gentlemen to hunt with him, although he does not himself go on the lands of another, but those other gentlemen do, he is answerable for the trespass that they may commit in so doing, unless he distinctly desires them not to go on those lands; and if (as in the present case) he does not so desire them, I think he is answerable, in point of law, for the damage that they do. With regard to the defendant's attempt to go into the plaintiff's barn, it is clear that the plaintiff had a right to refuse any person's going into it, if he chose to do so. Whether it might be discreet in him, is another question; but, undoubtedly, he had a right to say, that they should not go into his barn; and if they did so, they are trespassers.

Verdict for the plaintiff—Damages, 100*l.*

Scarlett, A. G., *Alderson*, and *Jeremy*, for the plaintiff.

Brougham and *Curwood*, for the defendant.

[Attornies—*Young & J.*, and *Clark & F.*]

1827.

COURT OF KING'S BENCH.

Sittings at Westminster, after Mich. Term, 1827.

BEFORE LORD TENTERDEN, C. J.

Nov. 29th.

SHARP v. PRATT.

If a person who has possession of another's goods, is desired by the owner to send them to a particular place, and he not only refuses to send them to that place, but says generally that he will not deliver them up, unless payment of a debt due from the owner to him is guaranteed; such general refusal is evidence of a conversion, although he might not be bound to send the goods to any particular place.

TROVER for clothes, army accoutrements, saddlery, &c. Plea—General issue.

It appeared that the plaintiff, an officer in the 8th regiment of Hussars, had joined his regiment at Dundalk, in Ireland; and that the goods, for which the action was brought, had been sent by the different tradesmen of whom the plaintiff had bought them, to the defendant, to be packed, and forwarded to Ireland. The defendant did not forward them; and the plaintiff, therefore, sent the following authority to his agent, Mr. Pearson.

“Brighton, Friday 11th, 1827.

“Will you have the goodness to call on Mr. Pratt, of Bond Street, and see if my baggage has been sent to your house in Dublin; if not, you have my authority to take it from him, and have it sent yourself. Mr. Pratt has so often disappointed me, that I think this precaution is necessary. I shall be in town I hope in a day or two.—Yours, most truly,

W. E. Flood Sharp.”

Mr. Pearson authorized Mr. Friswell to apply for the goods; and the latter, accordingly, sent the following letter to the defendant.

“93, Wimpole Street, 16th May, 1827.

“Sir,—I am informed by Mr. Pearson, the agent for

Mr. Sharp, that you detain the latter gentleman's military and other luggage, which was sent to you to be packed; and that your pretence for so doing is the non-payment of an account due to you by Mr. Sharp. Mr. Pearson has informed me that he has explained to you that your money is perfectly safe, although immediate payment cannot be made of your account. It will, therefore, be unnecessary for me to explain further, although I shall be willing so to do if you desire it: but I now write to inform you, that Mr. Sharp's authority for delivering up the things to Messrs. Cork and Spain shall be produced to you; and that, after such production, if you persist in your refusal to deliver them up, I shall instantly adopt proceedings to compel you to do so.—I am, Sir, your obedient servant,
W. Friswell."

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This letter was delivered to the defendant by a clerk of the plaintiff's attorney, who also handed the defendant the authority from the plaintiff, and at the same time demanded the property, which the defendant refused to deliver up; and it was proved by Mr. Spain, (the person mentioned in the letter), that the defendant called on him, and asked him if he would receive the property, and he answered that he would; but the defendant then said, that he would not give up the property unless Mr. Spain would guarantee the amount of a claim he had upon the plaintiff. Mr. Spain declined to do this, and the defendant said he would not give up the property without it.

Brougham, for the defendant.—I submit that there is no sufficient demand. Mr. Friswell's letter is any thing but a demand. Mr. Pearson was authorized by the plaintiff, and he authorizes Mr. Friswell. Now the latter only says, if you do not deliver the goods to Cork and Spain, I shall proceed against you. His letter only asks the defendant to carry the goods to Cork and Spain, and a refusal to do that is no conversion.

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Lord TENTERDEN, C. J.—I think there is a sufficient demand and refusal in this case. The defendant's answer is not, that he will not send the goods to Cork and Spain, but he tells the attorney's clerk, that he will not deliver them up; and then this is followed by his telling Mr. Spain that he will deliver them up, if Mr. Spain will guarantee his demand upon the plaintiff; which Mr. Spain very properly refuses to do.

Brougham.—Taking it that there is a refusal, does your Lordship think that any sufficient demand is proved?

Lord TENTERDEN, C. J.—Yes, I do.

Verdict for the plaintiff.

Denman, C. S., and *Godson*, for the plaintiff.

Brougham, for the defendant.

[Attornies—*J. Hill*, and *G. F. Abraham*.]

Nov. 30th.

NICHOLE v. ALLEN.

If a person know that his illegitimate daughter, of the age of 16, is boarded and clothed by the plaintiff, and neither expresses dissent, nor takes his daughter away, he is liable to pay the plaintiff for such board and lodging without any express promise to do so. And it lies on the defendant to shew that his daughter was boarded and lodged by the plaintiff against his consent, or that he has refused to be at the expense of maintaining her.

ASSUMPSIT for board and lodging furnished to the illegitimate daughter of the plaintiff. Plea—General issue.

It appeared that the child had been boarded and lodged by the plaintiff, since the year 1811; but the present claim was only for board and lodging from the month of May, 1823, to May, 1825. It was proved that the defendant had always acknowledged the child as his daughter, and knew of her being boarded at the plaintiff's, and one of the witnesses stated in cross-examination, that the defendant at one time allowed 12l. a-year for her support.

J. Williams.—I submit that there is no proof of any promise to pay.

Lord TENTERDEN, C. J.—The father is under an obligation to maintain his child: he knows where his child is, and the witness has told you, that at one time he allowed 12*l.* a-year for its maintenance.

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J. Williams.—There is no proof that the 12*l.* is not paid still.

Lord TENTERDEN, C. J.—It lies upon you to shew that.

J. Williams.—The girl is now sixteen years old.

Lord TENTERDEN, C. J.—That may be, but unless the defendant has given distinct notice of his intention to pay no longer, I shall hold him liable: and leaving out of the case all about the allowance, it stands thus:—he acknowledges her as his child; he knows where she is; and allows her to remain there.

J. Williams.—There is, I admit, a moral obligation to found a promise, but there is no evidence of any such promise being made.

Lord TENTERDEN, C. J.—There is not only a moral, but a legal obligation on the defendant, to maintain his child; he knows where she is, and he expresses no dissent, and does not take her away. There is a legal obligation made out, if it is shewn that she is maintained in the plaintiff's house, and he knows it; and it then lies on the defendant to shew that she is there against his consent, or that he has refused to maintain her any longer at his expense.

Verdict for the plaintiff.—Damages 23*l.*

Comyn, for the plaintiff.

J. Williams, for the defendant.

[Attornies—*W. Wood*, and *Allen, G. & A.*]

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See the case of *Cameron v. Baker*, ante, Vol. I. p. 268; and the case of *Hesketh v. Gowing*, there cited. In the case of *Furillio v. Crowther*, 7 D. & R. 612, where the supposed father of an illegitimate child had made various pay-

ments for its maintenance, and then refused to continue its support until the mother obtained an order of filiation; it was held, that no action would lie for arrears of maintenance, at the suit of the mother.

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PARKER v. VINCENT.

A. let a house to the plaintiff, who underlet to the defendant; and on the plaintiff becoming bankrupt, the assignees consented to an action for use and occupation being brought by A. in the plaintiff's name. A. died, and his executor directed the plaintiff's attorney to go on with the action: Held, that the executor was not a competent witness on the part of the plaintiff.

ASSUMPSIT for use and occupation. Plea—General issue.

It was opened, that this action had been brought by the direction of Mrs. Rowley, (since deceased), who was the ground landlady of the premises, which were a shop and cellar, in the parish of St. Augustine, in the city of Bristol; and that Mrs. Rowley had let the premises to the plaintiff, who had underlet to the defendant. But that, on the plaintiff becoming bankrupt, his assignees gave up their interest to Mrs. Rowley; consenting, however, that the present action for use and occupation should be brought against the defendant in the name of the bankrupt.

To prove the case, the executor of Mrs. Rowley was called:—he stated, on the *voire dire*, that Mrs. Rowley had employed the attorney to bring the present action; and that he (the witness) had instructed him to continue it: but he also stated, that it was carried on for the benefit of Mrs. Rowley's estate, he himself taking nothing under her will.

F. Pollock, for the defendant.—This witness is incompetent, because, by instructing the attorney to go on with the action, he has made himself liable for the costs.

Taunton, contra.—The witness has become interested since the commencement of the suit; and it has been decided, that, where the interest accrues after the action is commenced, the party shall not be deprived of the advantage of the witness's testimony.

Lord TENTERDEN, C. J.—Who is deprived of it in this case?

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Taunton.—The plaintiff, my Lord.

Lord TENTERDEN, C. J.—He is merely a nominal plaintiff, and has no interest whatever. I think that this witness cannot be examined. He is incompetent.

Nonsuit.

Taunton and *Lumley*, for the plaintiff.

F. Pollock, for the defendant.

[Attornies—*Dax & Co.*, and *Poole & Co.*]

In the case of *Barlow v. Vowel*, Skin. 586, it was held, that a witness laying a wager on a fact, was not thereby rendered incompetent as a witness respecting it; and in the case of *Rex v. Fox*, 1 Str. 652, Lord *Raymond* admitted a prosecutor as a witness, though he had laid a wager that he would convict the defendant. In the case of *Bent v. Baker*, 3 T. R. 37, Mr. Justice *Grose* says, that "the rule is, that a person in whose evidence another has gained an interest shall not, by his own act, deprive the other of the benefit of his testimony." However, Mr. Phillips, (in his *Law of Evidence*, p. 137), expresses a doubt, whether this proposition is not expressed in too

general terms, and conceives that the case of *Barlow v. Vowel*, must have been decided on the ground of fraud. And in the case of *Forrester v. Pigou*, 3 Camp. 380, and 1 M. & S. 9, Lord *Ellenborough* held, that an underwriter who pays on a promise of re-payment, if the policy be determined to be invalid, is not a competent witness for another underwriter who disputes the loss; but that if the promise of re-payment had been made after he had paid unconditionally, or if the party had fraudulently entered into the agreement with him for the purpose of taking off his evidence, it would be otherwise.

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If an auctioneer signs a contract for the sale of a house in his own name, and receives the deposit (his principal being present), and, after the purchaser has left the room, pays over the deposit to such principal:—The purchaser may, notwithstanding this, maintain an action against the auctioneer, to recover back his deposit, if a good title cannot be made.

GRAY v. GUTTERIDGE.

MONEY had and received. Plea—The general issue. This action was brought to recover back a deposit made at a sale by auction. It appeared that the defendant was an auctioneer, and that, at Garraway's Coffee-house, the plaintiff became the purchaser of a house in Devonshire-street, Portland-place, when the plaintiff, as the purchaser, and the defendant, being the auctioneer, signed the following contract, which was written on the back of the usual printed conditions of sale:—

"I, the under-signed William Gutteridge, do hereby acknowledge to have this day sold by auction, and I, the under-signed John Gray, do acknowledge to have this day purchased, the hereditaments and premises comprised in Lot. I. of the annexed particulars of sale, at and for the price and sum of 1080*l.*, and have paid a deposit of 226*l.*; and *we do hereby mutually agree* to complete such sale and purchase, agreeably to the annexed conditions of sale: as witness our hands, this 28th day of September, 1826.

"William Gutteridge,

"John Gray."

When the contract was signed, the plaintiff paid the deposit, by giving the amount to the defendant, the vendor being present. It, however, appeared, that after the plaintiff had left the room, the defendant handed over the deposit to the vendor. The purchase went off, because the vendor could not complete the title by the time agreed upon.

Follett, for the defendant.—I submit, that the plaintiff must be nonsuited. In cases of this kind, there is this distinction taken:—If the auctioneer pays over the deposit after notice not to do so, or after he has reason to know that the title is bad, he remains liable, notwithstand-

ing he has paid the money over: but if he pays over the money, he having, at the time, no reason to suspect that the title cannot be completed, the action must be, not against him, but against his principal. The case of *Edwards v. Hodding* (a), is decided expressly on the ground, that the person paying over the money had occasion to know that there was not a good title.

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Lord TENTERDEN, C. J.—I quite agree with every thing that is laid down by the Court in that case.

Follett.—That case is recognized in the case of *Horsfall v. Handley* (b).

Lord TENTERDEN, C. J.—Does it appear that there was a signed contract in that case?

Follett.—There is also the case of *Spittle v. Lavender* (c), which is exactly like this case, except that the principal was present; and, in the case of *Burrough v. Skinner* (d), the money had not been paid over.

Lord TENTERDEN, C. J.—In this case, the defendant, as auctioneer, signs the written contract, and the money is paid to him, his principal being present; and he does not pay it over to his principal till after the party is gone. He signs the contract in his own name, and receives the money himself; and it is the constant habit of persons making purchases at auctions to pay their deposit-money, trusting to the solvency of the auctioneer. If you think you can sustain a rule, you may move the Court; but I have no doubt about it. If it were not so, endless mischief would ensue.

Verdict for the plaintiff—Damages 226*l*.

(a) 5 Taunt. 815.

(b) 2 Moore, 5.

(c) 2 B. & B. 452.

(d) 5 Burr. 2639.

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*Taunton and Comyn, for the plaintiff.**Follett, for the defendant.*[Attornies—*Fuller & S., and J. E. Fox.*]

In the ensuing Term, *Follett* moved for a rule to enter a nonsuit, which was refused.

[Mr. Sugden says (Vend. and Pur. 37), "The auctioneer should not part with the deposit until the sale be carried into effect; because he is considered as a stakeholder or depository of it: and, in a late case (*Edwards v. Hodding*), where the auctioneer was also the attorney of the seller, and paid over the money to the seller after he knew that objections to the title had been raised, an action against him for the deposit was sustained; but the Judges cautiously abstained from pointing out the duty of an auctioneer in any other case." P. 39.—"If, pending a suit for specific performance, a deposit be laid out in the public funds, under the authority of the Court, it will be binding on both vendor and vendee; and, if laid out without opposition by the seller, it must be presumed to be with his assent; and, in either case, he must take the stock as he finds it. But if a purchaser is entitled to a return of his deposit, he is not compellable to take the stock in which it may have been invested, unless such investment were made under the authority of the Court, or with his assent; and an assent will not be implied against a party because

notice was given to him of the investment, to which he made no reply (13 Ves. 561). Therefore, where the deposit is considerable, and it is probable that the purchase may not be completed for a long time, it seems advisable for the parties to enter into some arrangement for the investment of the deposit."

In the case of *Burrough v. Skinner*, the Court said, that the auctioneer was a stakeholder, and a mere depository, and that he ought not to part with the deposit till such time as the sale is finished and completed, and it shall appear to whom it properly belongs.

In the case of *Edwards v. Hodding*, the money had been paid over, but the defendant knew that there were objections to the title; and *Gibbs, C. J.*, said—"I do not say that the case in 5 Burr. is not maintainable to the utmost extent to which it goes; but it is not necessary for the Court to go so far for the purpose of the present action:" and Mr. Justice *Heath* observed, that it was admitted, that if express notice had been given to the defendant not to pay over the money, an action would lie, and that the defendant's know-

ledge of doubts in the title was equivalent to express notice. However, Mr. Justice *Dallas* said—"I wish distinctly to guard against saying what is the duty of the auctioneer in any other case."

The case of *Horsfall v. Handley*, 2 Moore, 5, was an action for money had and received against the defendant, who was a churchwarden. The defendant had received a sum of money from the clerk of a chapel, for burial fees on the interment of the plaintiff's wife, which sum was not due, and

had paid it over (with a number of other fees), to the treasurer of the chapel, as was his duty under a private act of Parliament, before action brought;—and it was held, that the action would not lie.

The case of *Spittle v. Lavender*, 2 B. & B. 452, proceeded on the ground, that the agent expressly agreed, "as agent for, and on the part and behalf of Spittle," and caused his principal to sign the approval on the back of the contract declared on.

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BIGG v. ROBERTS and Another, Executors of RUNDELL.

Dec. 1st.

COVENANT on a deed, dated December 27, 1806, executed by the deceased, whereby he covenanted to pay to his sister, Mrs. Bigg, an annuity of 600*l.* a-year for her life, and, after her decease, to his nephew, the plaintiff, for his life. Breaches—The non-payment of the annuity since the year 1812, when Mrs. Bigg died. Pleas—*First*, that the deed was not executed by Mr. Rundell; *Second*, that Mr. Rundell, in the year 1808, assigned, out of his own share, one-sixteenth of the profits of his trade as a jeweller and goldsmith, to the plaintiff; and that, in consideration thereof, Mrs. Bigg and the plaintiff agreed that the deed should be cancelled; that they represented to Mr. Rundell that it was cancelled; and that he, relying on that representation, in 1810 procured the plaintiff to be admitted to a share in the general partnership in the said business; but that, by fraud and covin, the deed was kept

If, in an action of covenant for arrears of an annuity, the defendant plead a release, lost by time and accident, and, to induce the Jury to presume a release, shew that the annuity was not paid for seventeen years, and that the plaintiff had borrowed money of the grantor of the annuity, and regularly paid him interest, without settling off the annuity:—The Jury ought not to find for the defendant, unless they are satisfied that there is

fair ground for supposing, that, at some particular period during the seventeen years, the plaintiff actually executed a release of the annuity; and, to rebut the presumption of such a release, the Jury may look at the situation of the parties, and take into their consideration the circumstances of the plaintiff being a near relative of the grantor of the annuity, having large expectations from him, and of the grantor being a very old man, peremptory with his relatives, and very attentive to his pecuniary concerns.

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uncancelled; *Third*, a similar plea in substance, omitting the fraudulent misrepresentation; *Fourth*, that, in consideration of the plaintiff being taken into partnership, he agreed that the profits of his share of the trade should go in satisfaction of the annuity; *Fifth* and *Sixth*, payment; *Seventh*, a release, lost by time and accident; *Eighth*, a set-off by two bonds given by the plaintiff to the deceased, payable a year after notice. The replication took issue on the whole of the special pleas.

From the evidence it appeared, that Mrs. Bigg and her son the plaintiff, previously to the year 1806, resided in the county of Northumberland; and that, in that year, Mr. Rundell wished them to reside in or near London, and he addressed very pressing and affectionate letters to them on that subject; and that they accordingly came to reside at Brompton, when Mr. Rundell executed the deed, as stated in the declaration. It was also proved, that, in the year 1807, Mr. Rundell made a will, in which he bequeathed the great bulk of his property to Mr. Bigg, as his residuary legatee. That, in the year 1808, Mr. Rundell gave Mr. Bigg a sixteenth share of the profits of his business, and a bond, payable after Mr. Rundell's own death, for 20,650*l*. However, in the year 1810, the then partnership expired, and, in that year, new articles of copartnership were entered into by Mr. Rundell, Mr. Bigg, and others, whereby Mr. Bigg was admitted to be a partner in the trade, with a larger share of the profits; but, to enable him to purchase a share of the stock proportionate to his share of the business, Mr. Rundell took Mr. Bigg's bond for 35,000*l*., bearing interest. Mrs. Bigg died on the 28th of April, 1812; but it was admitted that no payment of the annuity was made after the 25th of July, 1810, (the quarter-day preceding the formation of the partnership), but that it had been paid up to that time (with an addition of 200*l*. a-year for the years 1808 and 1809, by Mr. Rundell's own draft upon his banker. The annuity deed was produced uncancelled; and it was proved that Mr. Run-

dell, who was a man of immense wealth, understood business well, and was particularly cautious in pecuniary matters; but that he was "a man of strong temper, very capricious and peremptory with his relations;" and it also appeared, that, after the will made in 1807, he executed another will, by which he left the bulk of his property to Mr. Neeld, one of the defendants, who was the son of his niece; and that Mr. Rundell was eighty-one years of age when he died.

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Brougham, for the defendants.—It is stated that the annuity was originally given to induce Mr. Bigg and his mother to reside near Mr. Rundell; and it appears, that, in 1808, Mr. Rundell gave Mr. Bigg a share in his immense business, and he also has Mr. Rundell's *post-obit* for 20,000*l.* In 1810, Mr. Bigg is regularly made a partner in the house; and, from that time, not one atom of the annuity is ever demanded or paid. The claim is kept back for seventeen years; and, after Mr. Rundell is laid in his grave, it is brought forward against his executors. It may be said, that Mr. Bigg did not like to talk to his uncle about money. The contrary is the fact; for Mr. Bigg regularly paid interest on the 35,000*l.* for which Mr. Rundell held his bond, without ever attempting to claim the 600*l.* a-year. Does not this authorise you (the Jury) to presume that Mr. Bigg felt and knew that he had not the same claim on Mr. Rundell that Mr. Rundell had on him? If the annuity had been due, Mr. Bigg certainly would have deducted it. An account-current, of the date of 1st November, 1819, in Mr. Bigg's own hand-writing, will be put in; and by that it will appear that the very first item is a note given by Mr. Bigg to Mr. Rundell for 1791*l.*, being the amount of interest due from him on an account then stated. Now, if a person cannot pay the interest, but gives his note, it is clear proof that, if he had not been liable for the whole, he would have given his note for the less sum. The next year, interest is charged on the 1791*l.*, and the following year Mr. Bigg makes a pay-

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ment of 606*l*. It may be said—true, but the 600*l*. was the annuity, and 6*l*. by a check. No; the whole 606*l*. was paid by a draft on Messrs. Glyn; and the next year there is a payment of 666*l*. 13*s*. 4*d*., by a draft on Messrs. Coutts. If there ever was a case in which the silence of a party is eloquent against himself, this is it. He is here paying compound interest to Mr. Rundell, while, according to the present claim, Mr. Rundell owed him a large sum of money. If the annuity was due, why did not Mr. Bigg deduct it? and, not having done so, is it to be endured that he shall come, seventeen years afterwards, and claim all the arrears? In some cases, the Legislature has given a period of limitation, within which a claim shall be made. That on bills is six years; but, with respect to bonds, there is no legal period of limitation, and it is left to the Jury. Lord *Mansfield*(*a*) thought that eighteen years' silence was enough to induce a Jury to presume the satisfaction of a bond. Other Judges have considered twenty years as a proper time; and, in the case of *Oswald v. Lee*(*b*), Mr. Justice *Buller* says, that a Jury ought to presume satisfaction earlier than twenty years, if there be evidence to favor the presumption—such as a settlement of accounts between the parties, without any notice taken of the bond. Now, that case is exactly like the present, except that that was a bond, and this a gratuitous annuity deed. I know it will be said, that, as Mrs. Bigg did not die till the year 1812, the different transactions of 1808 and 1810 did not take place between the same parties. But, still, she was a member of the same family, and whatever was good for her son was good for her; and you may even presume this annuity deed in force till her death, because, where a considerable number of years has elapsed, the Jury may presume a release during any part of that time; and you will say, whether, after a lapse of so many years, and after so many settlements of accounts, you ought not to presume the deed satisfied.

(*a*) 1 T. R. 271.

(*b*) 1 T. R. 270.

The account opened by Mr. Brougham was put in, from which it appeared, that, in the year 1818, Mr. Bigg gave a note for the interest on his debt to Mr. Rundell, and that he paid interest on that note without making any charge of the annuity; and several of Mr. Bigg's letters were put in, enclosing checks for the regular payment by him, to Mr. Rundell, of the interest on that bond, to the time of Mr. Rundell's decease.

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Scarlett, A.G., in reply.—A great part of Mr. *Brougham's* address goes only to shew, that a Jury may, after twenty years, presume payment, if they see no reason to doubt it; and yet Mr. *Brougham* proves, by an elaborate argument, that in this case there was no payment at all. It is said in the pleas, that this deed was kept alive by fraud; but is there the slightest evidence of that? In 1808, Mr. Rundell gives Mr. Bigg his *post-obit* for 20,000*l.*; now, the deed was not cancelled then, as the annuity was paid till 1810. In the year 1810, there was no consideration for Mr. Bigg's giving up the annuity, as in that year Mr. Rundell made him pay 35,000*l.* for the share of the business that he received. Is it to be said that Mr. Rundell was careless about it. The contrary is proved; and they even found, that he had preserved the very letters that enclosed the checks for the payment of the interest by Mr. Bigg to himself. The deed is uncanceled in Mr. Bigg's hands. If it had been agreed to be given up, would Mr. Rundell, with the habits of business he possessed, have let it remain in Mr. Bigg's custody? It is said that Mr. Bigg did not introduce it into the accounts; if he had, it would have been satisfied. The fact was this: Mr. Bigg had great expectations from his uncle, and, as his uncle was a most capricious man, and did not chuse to mention this annuity, Mr. Bigg thought it most advisable to be silent about it, as it might exasperate Mr. Rundell, and put in hazard the chance he had of his family's acquiring half a million of money under that gentleman's

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will. That the annuity has never been paid, is admitted; and then the question is, whether Mr. Bigg and his mother agreed to cancel the deed, and by fraud kept it alive.

Brougham.—My friend has not alluded to the plea of a release.

Scarlett, A. G.—You are asked to presume a release lost by the gentleman that preserved the letters enclosing the checks for interest. There is no evidence of any release; and you cannot presume a release without a consideration; and there was no consideration to ground a release after the year 1810.

Lord TENTERDEN, C. J. (in summing up).—This is an action on a deed executed by Mr. Rundell, in the year 1806, whereby he covenants to pay to Mrs. Bigg 600*l.* a-year for her life, and after her death to pay it to the plaintiff. Mrs. Bigg died in the year 1812, and the plaintiff claims the arrears from that time. The defendants have pleaded several pleas: *first*, they deny the execution of the deed by Mr. Rundell; but that is proved. The next two pleas state, that, in consideration of Mr. Rundell giving Mr. Bigg a share in his business, he agreed to give up the deed. This is denied in the replication; and there is no proof of it attempted; and it is clear that there was no such agreement at that time. These pleas, then, go on to charge fraud. The next plea states, that the profits of Mr. Bigg's share of the business were to go in satisfaction of the deed; but this is not proved. The two next pleas of payment are abandoned. The next is a release by deed. There is also a plea of set-off, but that is not material, because the bonds to be set off are only payable a year after notice; and no notice is proved to have been given. And the defendants put their case on this: that on the admission of Mr. Bigg into partnership in the year 1810, he executed a release of this annuity; but it

should be recollected, that he gave a bond for the share he had; and we must not forget that Mr. Rundell was a very careful man; and you will have to ask yourselves, whether he would not have carefully kept a deed of such importance. The great topic used for the defence is the payment of interest by Mr. Bigg to Mr. Rundell, without his setting off the annuity. That this was the fact is proved by Mr. Bigg's letters, and by the account; and you are therefore to consider whether this convinces you that the annuity was released; and in doing so, you must look at the situation of the parties. They were not indifferent persons; they were uncle and nephew, the latter having a large family, and great expectations from the former, and the annuity being not one for which money had been paid, but one which was a mere voluntary gift. The uncle is proved to be a man far advanced in years, and very attentive to his pecuniary concerns; and we see, and indeed it is in human nature, that as men advance in years, and go on accumulating wealth, they have an increased desire to grasp at, and accumulate more. You will therefore say, whether you think that the forbearance of the plaintiff to claim this annuity was on account of his having executed some deed of release, which cannot be found; or whether you will attribute it to this, that having great expectations from his uncle, and having also that due regard to his own interest, and that of his family, which every man ought to have, he chose regularly to pay the interest on his own bond, which his uncle exacted as matter of business, and yet forbore to mention the annuity, as it might induce his displeasure by lessening the sum that his uncle had to receive of him. If you find a verdict for the defendants, you must be satisfied, that there is fair ground to suppose, that at some particular period a release of this annuity was really executed by Mr. Bigg; and if you are not so satisfied, the plaintiff is entitled to recover.

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Verdict for the plaintiff.—Damages, 8850/.

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*Scarlett, A. G., and Ingham, for the plaintiff.**Brougham and Tomlinson, for the defendant.*

[Attornies—Kensit, and Amory & C.]

In the case of *Read v. Brookman*, 3 T. R. 151, it was held, that a deed may be pleaded as "lost by time and accident," without making profert of it; but in the case of *Hendy v. Stephenson*, 10 Ea. 55, a justification in trespass was pleaded, which, after stating that the defendant was possessed of a right of common under a grant, proceeded as follows: "which deed is since lost or destroyed, by accident and length of time, and therefore cannot be brought into Court here, and the date thereof is, and the particular parties thereto are, for that reason, wholly unknown to the said defendant:" the Court held this bad, as being much too loose in the description of the deed.

As to *presuming payment of money* to satisfy a bond after a long lapse of time, Lord Mansfield said, (1 Bur. 434), that there was no direct and express limitation of time, when a bond should be supposed to be satisfied; the general time was commonly taken to be about twenty years, but he had known Lord Raymond leave it to a jury upon 18 years; and in the *Winchelsea* causes, 4 Burr. 1963, his Lordship says, that bonds which have lain dormant, shall be supposed to be satisfied after twenty years. However, in the case of *Welden v. Davis*, cited 1 T. R. 271, his Lordship held a lapse of eighteen years sufficient to raise

a presumption of payment; and in the case of *Oswald v. Legh*, Id. 272, we find that the same learned Judge said, that there was a distinction between length of time as a bar, and where it was only evidence of it. The former was positive, the latter only presumption; and he believed, that, in the case of a bond, no positive time had been expressly laid down by the Court, that it might be eighteen or nineteen years. However, in the same case, *Buller, J.*, says, "I have always been of opinion, that *no less time than twenty years* could, of itself, form a presumption that a bond had been paid. For even, with regard to the rule of twenty years, where no demand has been made during that time, that is only a circumstance for the Jury to found a presumption upon, and is in itself no legal bar. In those cases, where satisfaction of a bond has been presumed within a *less period*, some other evidence has been given in favour of such a presumption; such as *having settled an account* in the intermediate time, without any notice having been taken of such a demand. In the case of *Hethershell v. Bows*, Mod. Ca. 22, Lord Holt says, "if a bond be of twenty years' standing, and no demand proved, or *good cause of so long forbearance* shewn, I shall intend it paid on *solvit ad diem*." As this is matter of pre-

sumption for the Jury, like all other presumptions, it may be rebutted by evidence. (1 Cowp. 109). In the case of *Colsell v. Budd*, 1 Camp. 27, Lord *Ellenborough* says, "after a lapse of twenty years, a bond will be presumed to be satisfied, but there must be either a lapse of twenty years, or a *long time, coupled with some circumstance* to strengthen the presumption. Here, if it had been proved that the parties had accounted together after the money became payable, it might have been inferred that it was included in the settlement; but as there is no evidence of this; and as twenty years have not elapsed since the bond was forfeited, it cannot be considered as discharged." These cases were mostly decided on the plea of *solvit ad diem*; but if there was a payment of interest after the day, and this was followed by a long lapse of time, the plea of *solvit ad diem* would be improper, and the plaintiff would recover. The proper plea, under those circumstances, would be *solvit post diem*. To rebut the presumption of payment at the day, an indorsement of a payment of interest in the handwriting of the obligee, is evidence, if it be shewn by other evidence, that such indorsement was made within the twenty years, and therefore at a time when it was against his interest to make it; but if it be not shewn that it was made at such a time, it is not evidence. *Searle v. Lord Barrington*, 2 Str. 826; and this case has been repeatedly acted upon. It should be observed, that the foregoing cases relate to the payment of money due on a bond; but

we have not found any case, in which, from mere lapse of time, the execution of a release was presumed. In the case of *Read v. Brookman*, (3 T. R. 158), *Ashurst, J.*, says, that "where a man's deeds and muniments are lost by fire, proffer of the deed pleaded may be dispensed with. The case of fire is only put by way of instance; for if the deed be destroyed by any other accident, it falls within the same reason; and that brings it to a matter of fact before the Jury, *whether there be or be not sufficient evidence that the deed did exist.*" And in the case of *Hendy v. Stephenson*, (10 Ea. 60), Lord *Ellenborough* says, "I recollect an instance within my own experience, where, in an action on the Northern Circuit, touching a water course, a grant was pleaded upon presumption of its existence, though it could not then be found; but it was thought necessary to state the supposed names of the grantor and grantee, and the time, *of all which the party gave probable evidence.*"

In the case of *Doe d. Fenwick v. Reed*, 5 B. & A. 232, where it appeared, that the defendant's ancestor was let into the possession of lands in 1752, he being a creditor, who had obtained a judgment against the then owner of the land, and that the defendant's family had continued in possession ever since;—the Court held, that the original possession not having been taken under any conveyance, the length of possession was only *prima facie* evidence from which a Jury might infer a subsequent conveyance; but that that might be rebutted, and that the Jury

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must not presume such conveyance from length of possession, unless they were satisfied that it had actually been executed.

As to presuming a grant from the Crown, see the case of *The Mayor of Hull v. Hörner*, Cowp. 102. As to presuming the extinguishment of a quit rent, see *Elldridge v. Knott*, Id. 214. That twenty years' uninterrupted en-

joyment of windows looking over another's lands, is, if un rebutted, sufficient ground to presume a license, was held, in the case of *Cross v. Lewis*, 4 D. & R. 234. As to presuming the surrender of attendant terms, see the cases of *Doe d. Burdett v. Wright*, 2 B. & A. 710; *Doe d. Putland v. Hilder*, Id. 782; and *Bartlett v. Downes*, ante, Vol. 1, p. 522.

Dec. 7th.

REX v. GILKES and Others.

On an indictment against the stewards, &c. of a benefit society for disobeying an order of two justices, commanding them to re-admit A. B. to be a member of that society, it is no defence, that A. B. was a person, who, by the rules of the society, was ineligible to be a member of it, as that was matter of defence before the justices; and if it be proved that the order was served on one of the defendants, and that the others, when A. B. applied to be re-admitted, said, that they would not admit him, and did not care for the justices' order; that is presumptive evidence of a service of the order upon them.

INDICTMENT for disobeying the order of two Justices to re-admit George Spurging to be a member of a Benefit Society. The *first* count stated, that heretofore, to wit, on the 21st day of March, in the 8th Geo. 4, at the Police Office, Worship Street, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, Samuel Twyford, and William Bennett, Esqrs., two of the Justices of our said lord the king, assigned to keep the peace of our said lord the king in and for the county aforesaid, and also to hear and determine divers felonies, trespasses and misdemeanours committed in the same county, did, in due form of law, make a certain order under their hands and seals, which said order was as follows: [It here set out the order *verbatim*, which recited that George Spurging was a member of the Alfred Union Benefit Society; and commanded the president and members, immediately *on sight thereof*, to restore and re-admit the said George Spurging to be a member of the said society], of which said order the said William Gilkes, S. W., R. C., G. B., J. K., and J. M. afterwards, to wit, on the 22d day of March in the year aforesaid, in the parish aforesaid, in

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the county aforesaid, *there had due notice* (a). Nevertheless the said William Gilkes, late of the parish aforesaid, in the county aforesaid, labourer, S. W., late of the same, labourer, (describing all the defendants), afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully and contemptuously did neglect and refuse, and still do neglect and refuse, to restore and re-admit the said George Spurning to be a member of the said society, as by the said order the said William Gilkes, S. W., R. C., G. B., J. H., and J. M., were required to do, in contempt of our said lord the king and his laws, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity. The *second* count stated the substance of the order, but did not set it out. Plea—Not guilty.

A witness proved, that he saw the order signed by the Justices.

Reader, for the defendants, objected, that, before it was read, it must be proved, that the rules and regulations of the Society had been duly enrolled at the Quarter Sessions; as, without that, the Justices had no jurisdiction.

LORD TENTERDEN, C. J.—I shall not stop the case on this objection; but I will give you leave to move to enter a verdict for the defendants (b).

The Justices' order was read; and it stated, *inter alia*, that the rules and regulations were duly enrolled.

The prosecutor proved, that he served the order on Sylvanus Ward, one of the defendants, by giving him a

(a) It may be worthy of consideration, whether this indictment

is good. The order is, to admit "upon sight." The indictment only states, that they had "due no-

tice" of it.

(b) See the stat. 39 Geo. 3, c. 64, and the cases of *Rex v. Aire and Calder Navigation*, 2 T. R. 666; and *Rex v. Hulcot*, 6 T. R. 583.

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duplicate of it, signed by the Justices; and that some days after that he went to the club-room, and saw all the other defendants, and asked them to re-admit him in pursuance of the order; when two of them said, that he should not be re-admitted, and that they did not care for the magistrates' order; and that to this all the members present expressed their assent.

Reader, for the defendants.—I submit, that there is no evidence of a service on any of the defendants except Ward.

LORD TENTERDEN, C. J.—I think there is presumptive evidence against the whole of the defendants; for when the party goes to be re-admitted, they say they do not care for the order, and will not obey it.

Reader.—My Lord, I am in a condition to shew, that at the time when Spurgin was excluded from the society, he had done that which, by the rules of the society, justified the other members in expelling him.

LORD TENTERDEN, C. J.—That was your defence before the magistrates; and I cannot try the merits of the order here. The Legislature evidently meant, that the parties should have speedy and summary justice before the magistrates: however, you shall have the benefit of the question, whether it is necessary to prove the rules enrolled.

Verdict—Guilty.

Scarlett, A. G., and *Platt*, for the prosecution.

Reader, and *Adolphus*, for the defendants.

[Attornies— ———, and *P. Leigh*.]

In the ensuing Term, *Adolphus* moved in pursuance of the leave given, and the Court granted a rule *Nisi* on that point only.

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BISHOP, Surviving Partner, *v.* CHAMBRE.

Dec. 8th.

ASSUMPSIT by the plaintiff, as surviving payee, of a promissory note for 30*l.*, dated 27th *May*, 1814, payable six weeks after date, and made by the defendant in favour of the plaintiff and his two deceased partners. There were counts in the declaration, stating promises to the three partners, and also another set of counts stating a promise to the plaintiff, as surviving partner. Pleas—First, General issue; Second, the statute of limitations; Third, infancy. Replication—That the promise was within six years; and that the defendant had promised since he came of age. The note was produced, and a witness named Beswick, stated, that in the month of April, 1827, he called on the defendant and shewed him the note, when the defendant said, “I know I owe Mr. Bishop money, I wish you had applied sooner; is this my hand-writing?” and Mr. Beswick replied, “It is;” on which the defendant said “I write very differently now; but Mr. Bishop is a very honourable man, and I have no doubt it is all correct, and I will send the money.”

In an action on a note, if it appear on the inspection of the note, that it has been altered, it lies on the plaintiff to shew that the alteration took place under such circumstances as will entitle him to recover.

Whether a conversation between the defendants and one of the witnesses, is sufficient to entitle the plaintiff to recover, on the account stated, is a question for the Court, and not for the Jury.

The note was in the following form:—

May

“St. John’s Coll., Cambridge, 27

“£30 : 0 : 0

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Six weeks after date, I promise to pay to Messrs. M. R. and W. Bishop, or order, thirty pounds, for value received.

Alan Chambre.”

Beyond the figures 27, in the date, was a part of some other letter or figure; and a portion of the paper on which the note was written appeared to have been cut away close to the figures 27.

Lord TENTERDEN, C. J.—The word “May” appears to me to be in a different ink from the rest of the note, and a portion of the paper has been cut off.

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Brougham, for the defendant.—It lies on the plaintiff to explain away any circumstance of suspicion that appears upon the face of the instrument. It lies on the party producing it to do that, and not upon us.

Lord TENTERDEN, C. J.—If the note was altered after it got into the hands of the plaintiff, it will require a new stamp.

Denman, C. S., for the plaintiff.—There is no evidence of any alteration.

Lord TENTERDEN, C. J.—The word "May" is in a different hand, and it is clear that something has been cut off; and where a note appears to have undergone alteration, the party suing on it must account for that.

Denman, C. S.—Supposing the note to have been altered, yet as the defendant, when he saw it, was told that the plaintiff had a claim on him for 30*l.*, and promised to send the money, is not that sufficient on the account stated?

Lord TENTERDEN, C. J.—The whole conversation plainly refers to the note.

Denman, C. S.—I hope your Lordship will leave it to the Jury to say, whether there is not a general admission of a debt due from the defendant to the plaintiff?

Lord TENTERDEN, C. J.—I will ask the Jury whether they think that the word "May," is in the same handwriting with the rest of the note. But the effect of the defendant's admission, as answering the plea of infancy, and the plea of the statute of limitations, is for the Court, and not for the Jury.

Denman, C. S.—I submit that the effect of the promise should be left to the Jury.

Lord TENTERDEN, C. J.—I am clearly of opinion that I cannot leave *that* to the Jury.

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Brougham, for the defendant, addressed the Jury on the question whether the word "May" was added after the note was in the hands of the plaintiff.

Lord TENTERDEN, C. J.—(In summing up to the Jury).—It appears to me, that the evidence in this case is not such as to entitle the plaintiff to recover on any thing but the note. In point of law, if, after a note is delivered to the party who is to derive benefit from it, it is altered, such note is rendered invalid. The question is, whether you think, on inspection of the note, that it was altered after it had become a perfect instrument in the hands of the plaintiff. Looking at the instrument, it appears, that the whole of it is in one hand-writing, with the exception of the word "May," which is in a different hand, and written with paler ink. The paper, too, is cut, and there appears to be a line, which was a part of some letter or figure cut off. And if you think that these alterations took place after the note came into the possession of the plaintiff, you must find your verdict for the defendant.

Verdict for the defendant.

Lord TENTERDEN, C. J.—I shall give the plaintiff's counsel leave to move to enter a verdict for the plaintiff, for such sum as he is entitled to upon this evidence, if the Court shall think that I am wrong in my opinion.

Denman, C. S., and *Talfourd*, for the plaintiff.

Brougham, for the defendant.

[Attornies—*Abbott*, and *Manning & D.*]

See the case of *Sentance v. Poole*, ante p. 1.

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BEFORE LORD TENTERDEN, C. J., BAYLEY, HOLROYD, AND
LITLEDALE, JS.—In Bank.

Jan. 23rd.

Denman, C. S., now moved to enter a verdict for the plaintiff, in pursuance of the leave given; and submitted also that it should have been left to the Jury to say, not only whether the note had been altered after it was signed, but whether, if so, it had been altered with the consent of the defendant.

LORD TENTERDEN, C. J.—If the note was ever given into the hands of the plaintiff as a perfect instrument, it could not be altered even with the consent of all the parties.

BAYLEY, J.—It would require a new stamp.

The Court granted a rule to shew cause on the question whether the admission of the defendant was sufficient to entitle the plaintiff to recover on the account stated.

Dec. 8th.

OLDERSHAW v. TREGWELL.

SAME v. SAME.

If a party sue on a bill, and, after the action is commenced, another bill, accepted by the same defendant of which he is the holder, is dishonoured, and he bring a second action on that :—A Judge at chambers would, on application being made, direct the two actions to be consolidated.

THESE were actions on two bills of exchange, the one payable at two months, and the other at four months after date.

After the first bill had been dishonoured, the plaintiff commenced an action on it before the second bill became due. On the second bill becoming due, that was also dishonoured, and the second action was brought on that bill.

LORD TENTERDEN, C. J.—These parties need not, in this case, have been at the expense of two trials. If an application had been made to a Judge at chambers, an order might have been obtained to consolidate the actions.

I am sorry that such an application was not made, but I cannot help it now.

Verdicts for the plaintiff in both actions.

Carrington, for the plaintiff.

[Attornies—*Oldershaw, jun.*, and *Neck*.]

The authorities on the subject of consolidating actions will be found in 2 Arch. Pr. 198, but none of them exactly resemble the present, as they are all cases of actions commenced by the same plaintiff, against the same defendant, at the same time. However, as the saving of expense is equal-

ly beneficial to both parties, it might be worth while to consider whether, under circumstances similar to those of the principal case, a Judge at chambers would not order a consolidation at the instance of the plaintiff, as well as at the instance of the defendant.

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REX v. COPPARD.

Dec. 10th.

PERJURY.—The indictment stated, that, at the Sitings of *Nisi Prius*, holden after the Term of St. Michael, at Westminster, to wit, in the parish of St. Margaret, within the liberty of Westminster, in the county of Middlesex, on the 16th day of December, 7 Geo. 4, before Sir *Joseph Littledale*, knight, then and yet being one of his Majesty's Justices assigned to hold pleas in the Court of our said lord the king, before the king himself, a certain issue, before then duly joined in the said Court, between one John Smith and one Samuel Peach, in a certain plea of trespass on the case upon promises, in which the said John Smith was the plaintiff, and the said Samuel Peach was the defendant, came on to be tried, &c. The indictment then stated the oath, and averred, that, on the trial of that issue, it was material to inquire, "whether, in the beginning of the month of August, 1825, Amelia, the

On an indictment for perjury, in a cause at *Nisi Prius*, it is no variance that the *Nisi Prius* record states the trial to have been on a day different from that stated in the indictment.

If the indictment state the trial to have been before one of the Judges (who in fact sat for the Lord Chief Justice), and the *Nisi Prius* record state the trial to have been before the Lord Chief Justice; *semble*, that this is no variance.

If the indictment, in setting out the substance of oral evidence charged to be false, put "Mr." for "Mister," and "Mrs." for "Mistress;" this is no variance, though it should appear that the witness said "Mister" and "Mistress," and not "Mr." and "Mrs."

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wife of Samuel Peach, had seen the said Lawrence Coppard, and one William Nelson, then being servants of the said John Smith; and whether any conversation had then and there passed between the said Amelia Peach and the said Lawrence Coppard and William Nelson, or either of them, respecting the regilding of the frames of certain pictures," &c.; and went on to state, that the defendant, on the 6th of December, 7 Geo. 4, with force and arms, at &c. "upon his said oath, before the said Sir *Joseph Littledale*, at and upon the said trial, unlawfully, falsely, &c. did depose, swear, &c. amongst other things, in substance and to the effect following; that is to say, that, in August, 1825 (meaning the month of August, in the year 1825), he (meaning himself) went to Mr. Peach's house (meaning the house of the said Samuel Peach), about some tea-poyes, and that Mrs. Peach (meaning the said Amelia, the wife of the said Samuel Peach), gave them (meaning the said Lawrence Coppard and the said William Nelson) some orders." The indictment proceeded to set out the whole of the evidence given by the defendant on the trial of the action, and to assign perjury upon it. Plea—Not guilty.

The *Nisi Prius* record of the case of *Smith v. Peach* was put in. The *postea* stated the trial to have taken place before the Right Hon. Sir *Charles Abbott*, knight.

Scarlett, A. G., for the defendant.—The indictment states the trial to have been before Mr. Justice *Littledale*, and the *Nisi Prius* record states it to have been before your Lordship. The prosecutors cannot, by parol evidence, vary what is stated in the record.

LORD TENTERDEN, C. J.—They are not held to the day stated in the *Nisi Prius* record (a). I am told, that all the

(a) See the cases of *Rex v. Ayra*, 9 East, 157; *Woodford v. Ashley*, 1 T. R. 69; *Pope v. Foster*, 11 East, 508; and *Rex v. 4 T. R. 590*; *Purcell v. Macnamara*, 1 Stark. 521.

records on the Circuits are drawn up as before both Judges; and yet it has been held, that an indictment for perjury, stating the oath to have been taken on a trial before one Judge, is good, although the record of the trial names both (a). In London and Middlesex, every *distringas* is drawn, "except the Chief Justice shall come;" and I am not aware, that, if the trial is not before me, the name of either of the learned Judges before whom it may be, is ever mentioned in the record.

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Scarlett, A. G.—If the indictment had stated, that the trial was before your Lordship, that would have done, as the *Nisi Prius* record would have proved that allegation.

Lord TENTERDEN, C. J.—I shall not stop the case on this objection; but I shall give leave to enter a verdict for the defendant, if there is any thing in the objection.

A witness proved, that the trial was before Mr. Justice *Littledale*, and that the present defendant swore to a conversation with Mrs. Peach to the effect stated in the indictment.

(a) In the case of *Rex v. Alfred*, 1 Leach, 179, the prisoner was indicted for perjury, and the trial on which the oath was administered was stated to be before the Hon. *Edward Willes* (the Judge who actually tried the case). When the *Nisi Prius* record was produced, it stated (as usual) that the trial was before both the Judges. It was doubted whether this supported the allegation in the indictment; but, on the point being reserved for the twelve Judges, the conviction was held right. In the case of *Rex v. Emden*, 9 East, 437, the Court held, that the place mentioned in the jurat of an affi-

davit is not conclusive as to the place at which it was sworn; and that, on an indictment for perjury in Middlesex, if the jurat stated it to be sworn in London, the prosecutor might go into evidence to shew that it was sworn in London; and the Court also held that the jurat was not a necessary part of the affidavit to be set forth in the indictment; and, therefore, it was not necessary to set out the jurat, which stated a swearing in London, and then traverse it by an averment that the defendant was, in fact, sworn in Middlesex, and not in London.

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Adolphus, for the defendant.—In the indictment, in setting out the evidence charged to be false, they put “*Mr.*” for “*Mister*,” and “*Mrs.*” for “*Mistress*,” just as if they were setting out an affidavit, which is wrong.

LORD TENTERDEN, C. J.—But they put innuendoes—“meaning the said Samuel Peach,” and “meaning Amelia, the wife of Samuel Peach.”

Adolphus.—The indictment asserts, that, at the former trial, the witness said “*M. R.*” and “*M. R. S.*,” which is disproved, and is contrary to the fact.

LORD TENTERDEN, C. J.—I cannot read it so.

Adolphus.—I remember, in the case of *Rex v. Kennett(a)*, that the Court would not read “*Esq.*” to mean “*Esquire*.”

LORD TENTERDEN, C. J.—They do not profess to set out the tenor, but only the substance, which I think they have done.

Much evidence was given on both sides.

Verdict—Not guilty.

Gurney, Denman, C. S., and *Brodrick*, for the prosecution.

Scarlett, A. G., Adolphus, and *Kelly*, for the defendant.

[Attornies—*Carr & F.*, and *Cole*.]

(a) MS.

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BIRKETT v. CROZIER.

Dec. 11th.

TRESPASS.—The *first* count of the declaration was for breaking and entering the plaintiff's house, and carrying away his goods; *Second* count, for taking the goods only. Pleas—*First*, General issue; *Second*, to the first count of the declaration, that the supposed trespasses in the first count mentioned, were committed under the authority of the Commissioners of Sewers for the Tower Hamlets, for a lot or tax assessed on the plaintiff (*a*); *Third*, a

diction; and where the precept to the Sheriff was to summon "good and lawful men of your county, and resident within the Tower Hamlets," that being the district over which the Commissioners had jurisdiction.—It was held bad; and a presentment made by that Jury and all the subsequent proceedings founded on it, declared to be void.

(*a*) As there is no precedent for a plea of this kind in any of the published collections, the form of it may be considered acceptable. It was as follows:—

"And for a further plea in this behalf, as to breaking and entering the said dwelling house, and as to the seizing and taking the goods and chattels, (to wit), one set of cruets and frame, one hearth-rug, one fender, and one set of fire-irons there found, and carrying away the same, and converting and disposing thereof to his own use, as in the first count of the above declaration is mentioned, be the said defendant, by leave of the Court here for that purpose had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action against him, because he says, that the said supposed trespasses were committed by him, the said defendant, by the au-

thority of a certain commission of sewers for the Tower Hamlets, (excluding St. Catherine's and Blackwall Marsh) for a lot or tax assessed upon the said plaintiff by the said commission, according to the purport, tenor, and effect of a certain act of Parliament made in the 23d year of the reign of our late sovereign lord king Henry the Eighth; and this he the said defendant is ready to verify; and therefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him."

By the statute 23 Hen. 8, c. 5, s. 12, if the issue be found for the defendant, or the plaintiff is nonsuited, the defendant is entitled to treble damages, to be assessed by the same Jury who try the cause. However, in the case of *Warren v. Dix*, post, p. 71, Lord *Ellenborough* held, that, to entitle the defendant to such damages, he must pray them on the record. It therefore seems, that for a defend-

The Jury, who are summoned by the sheriff to make the presentment before Commissioners of Sewers, should come from the body of the county, and not from the district over which the Commissioners have juris-

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similar plea to the second count. Replication—*De injuria*.

Tindal, S. G., for the plaintiff, opened, that the plaintiff was possessed of a house at Hackney; that the defendant acted under the Commissioners of Sewers for the Tower Hamlets, in which the parish of St. John at Hackney is situated; and that the plaintiff's house was thirty-five feet above the level of the highest tide, and nine feet above the highest flood ever known; and he therefore contended, that the plaintiff was not liable to the sewer-rate, as he neither received benefit, nor was protected from damage by means of the sewers. He further stated that it would appear that the plaintiff had no use of the sewers for the running off of the refuse water of his house, as it would be proved that he had a cess-pool on his own premises; and he further objected, that the Commissioners had assessed the whole district of the Tower Hamlets under one general rate, which had never been done antecedent to the year 1825, and that the parish of Hackney had not been assessed at all to the sewers, prior to the year 1770; and that from the time of the earliest Tower Hamlets Commission, that district had been divided into several distinct levels: the Hackney Level, the Limehouse Level, and others; and they had been separately assessed, which was the only fair way; as it was most unjust, in the present mode, that the parish of St. John at Hackney, receiving little benefit from the sewers, should pay at the same rate as the parish of St. Anne, Limehouse, which received infinitely more benefit.

The trespass was admitted.

Scarlett, A. G., for the defendant.—If the parish of St.

ant to obtain the assessment of such damages, his plea should, after the conclusion of it, as it stands at present, go on, "and further prays his treble damages, by reason of

his wrongful vexation in this behalf according to the form of the statute in such case made and provided."

John at Hackney is aggrieved by the present Commission of Sewers, they might petition the Crown for a separate Commission for the Sewers of their own parish; but at present they are within the jurisdiction of the Commissioners of the Tower Hamlets; now it is the duty of the Commissioners to keep the sewers in order; and they have a Jury impannelled to make presentments of those persons who are, or may be, benefited by the sewers. The Jury having presented this, their presentment is made public; and the law gives each person, who considers himself aggrieved, a liberty to traverse such presentment before the Commissioners; and a new Jury may be called together to try the goodness of the presentment; but if, after public notice, no one comes in to question it, the Commissioners must consider that the presentment is acquiesced in; and they are bound to make an assessment of so much in the pound equally, on all those returned in the presentment. They cannot say how much one is benefited more than another. They must make an equal pound-rate upon their whole district. Take it, that the parish of Hackney is benefited to only a certain degree by these sewers, still, if it is benefited *at all*, the *proportion* of the rate to be paid by that parish is not to be regulated by a comparison of benefits as between them and other parishes, but there must be an equal pound-rate for the whole district, for which the Commissioners have jurisdiction. If a party has *no* benefit, the Jury ought not to return him at all; but if the Jury present, that he *may* derive benefit, he is made liable; and if he is wrongfully presented by them, he ought to traverse. If an act of Parliament points out a mode of proceeding, the party cannot take a different mode; and here the act of Parliament directs a Jury to be impannelled, to say who is liable, and then gives abundant opportunity to any party injured to traverse their presentment. Now, if a party may lie by, and say that the Commissioners and collectors are liable to actions of trespass, merely because they act as they are bound to do, and enforce a present-

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ment that nobody denies or questions, the greatest inconvenience would ensue; and I submit, that if a party neglects to traverse a presentment, he can take no objection to it afterwards. In the case of *Warren v. Dix* (a), Lord *Ellenborough* thought, that where the party lay by and did not traverse the presentment, he could not question it on the trial of an action like the present. It will be proved, that the plaintiff's attorney was furnished with a copy of the presentment; and he was therefore bound either to traverse or acquiesce. But as I have no right to presume what is my Lord's opinion on this point, I shall proceed to justify the conduct of the Commissioners. It is objected, that formerly the Commissioners divided the Tower Hamlets into smaller districts, called Levels, making a separate rate for each. But this was considered irregular; and the late Sir *V. Gibbs* advised, that the Commissioners could only make one general rate for the whole of the Tower Hamlets; and they have followed that advice, which I now have to contend, was their correct course. Indeed, if they were to go into a comparison of benefits, there ought to be a separate rate for every street or every house, as each street, or even each house, might receive benefit in a degree different from the others. I therefore submit, that there must be one general rate over the whole district, subject to the finding of the Jury who make the presentment; and if it is found that a party is benefited at all, he must pay in the same proportion as the rest. It is said that the plaintiff has no communication with our sewer, and that he has a cess-pool; but still it will be shewn that that cess-pool percolates into our sewer; and besides that, every shower of rain that comes on the roof of the plaintiff's house, runs off down his lawn, and into drains communicating with our sewer. In the case of *Stafford v. Hamston*, tried before Lord Chief Justice *Dallas*, it appeared that the party's refuse-water went

(a) This case is not in print. We have been favoured with a note of it, which see *infra*, p. 71.

into a pond; but, as it was also proved, that, when the pond overflowed, the surplus water went into the sewers, the party was held liable to the sewer-rate. If a new sewer is constructed, benefiting but a few, those few alone are liable to pay for the constructing of it; but if, when constructed, all may open drains into it, it is for the Jury then to say, not only who *are* benefited, but who *may be* so. I shall therefore contend, that as this rate was made under the presentment of a Jury, which is not traversed, that alone is an answer to the action; but if that should not be clear, I shall submit, that there can be no separate rate for the parish of St. John at Hackney, distinct from the rest of the Tower Hamlets; also, that the plaintiff's house is benefited by the sewers (a).

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Lord TENTERDEN, C. J., (having referred to the case of *Stafford v. Hamston* (b)).—I shall not stop the case upon the point, that a presentment not traversed is conclusive on the party; but I will reserve that question, either on bill of exceptions, or on a special verdict. It is a most important question.

Scarlett, A. G.—In the case of *Stafford v. Hamston*, the Court went expressly on the party's having no opportunity to traverse the presentment.

(a) As the modern authorities on the subject of liability to the sewers-rate are so few, we have given a brief outline of the arguments of the learned Attorney and Solicitor-General, though the case was eventually determined on another ground.

(b) 5 Moore, 608. This was an action of trespass for taking the plaintiff's goods, in which the defendants justified the taking for a sewers-rate. At the trial, the plaintiff offered evidence that she

was not benefited by the sewers. This evidence was rejected, but the Court granted a new trial; and *Dallas, C. J.*, said, "The Commissioners are only to assess those who receive, or are likely to reap profit, or who have or may sustain hurt, loss, or disadvantage. In the present case, the plaintiff offered evidence to prove that she derived no benefit from the sewer in question. The case states that this was objected to, on the ground that her house

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The Commission of Sewers for the Tower Hamlets was read (a). The precept to the Sheriff of Middlesex to summon the Jury, by whom the presentment was made, was also put in and read. It was as follows:—

“ Middlesex, to wit.—

“ To the Sheriff of Middlesex.

“ By virtue of his Majesty’s Commission of Sewers for the Tower Hamlets (excluding St. Catherine’s, and Blackwall Marsh,) under the great seal of Great Britain, bearing date the 15th day of February, one thousand eight hundred and twenty-one, to us and others directed; we, Sir D.W. Knight, C. S. &c., Esquires, six of the said Commissioners, do hereby

was within the district comprised within the decree; and it has been insisted that the presentment and decree were conclusive against her; but this depends on the question of jurisdiction; and the Commissioners could not conclude the party assessed without allowing her an opportunity of being heard.” “In some stage or other, the party who is to bear a burden, on the ground that he derives, or is likely to derive a benefit, or is in danger of taking some hurt, ought to have an opportunity of shewing that no benefit is or can be derived, nor hurt sustained. This he has not, before the presentment made, nor while it is making, nor before the decree; nor has he any notice of the presentment or the decree, but by the assessment, and notice of such assessment or demand, under it; the effect, therefore, of rendering the presentment and decree conclusive, would be to decide against the party unheard, and without al-

lowing him any possibility of being heard. On general principles, this would be unjust; but it is enough to state the cases referred to, in order to shew that the assessment is not considered as conclusive.” The cases referred to are *Masters v. Scroggs*, 3 M. & S. 447, and *Dore v. Gray*, 2 T. R. 358. In the former, it was held, that the Commissioners cannot assess a person in respect of drains communicating with a great sewer, if it is proved at the trial that the level of his drains is so much above the sewer, that he would not be benefited by work done on such sewer. In the latter, Mr. Justice Buller lays down, that, with respect to the jurisdiction of the Commissioners, the line to be drawn is, that where the party is or is likely to be benefited by the sewers, that is sufficient to give the Commissioners jurisdiction.

(a) The form of the commission is given in the stat. 23 Hen. 8, c. 5.

will and require you to cause to come before us, on Wednesday, the 17th day of August, now next ensuing, at a court of sewers, then to be holden at the Court House, Great Alie Street, in the parish of Saint Mary, Whitechapel, in your county, at two of the clock in the afternoon; forty-eight good and lawful men of your county, *and resident within the Tower Hamlets*, to inquire of all matters and things, relating to, or concerning the sewers of those limits; and to do and execute all such other matters and things as shall be then and there given them in charge; and herein fail not, at your peril: Given under our hands and seals, the 15th day of June, one thousand eight hundred and twenty-seven."

This precept was signed and sealed by six of the Commissioners.

Tindal, S. G.—This precept is bad. The Jury should come from the county at large, and here, the sheriff is limited to residents within the Tower Hamlets. By the commission itself, they are "to inquire, by the oaths of honest and lawful men of the said *shire or shires, place or places*, where such defaults or annoyances be, as well within liberties as without, by whom the truth may the rather be known, through whose default the said hurts and damages have happened, and who hath or holdeth any lands," &c. Now the words, "place or places," here evidently refer to cities and boroughs. The legislature meant counties and places *ejusdem generis*. I therefore submit, that if this precept is wrong, the presentment, and the whole of the subsequent proceedings, are *coram non judice*.

Scarlett, A. G., for the defendant.—The act goes on "place or places where the default shall happen," which means, the district over which the Commissioners have jurisdiction.

Curwood on the same side.—In the case of the *Cus-*

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todes Libertat. &c. v. The Inhabitants of *Outwere* (a), a presentment was quashed because it did not appear that the place was within *the Hundred* from which the Jury came.

Tindal, S. G.—But, in this case, the Jury does not come from the hundred. The commission in another part says, that “the sheriff or sheriffs shall cause to come such and so many honest men of his or their *bailiwick*, as well within liberties as without, by whom the truth may best be known.”

Scarlet, A. G.—It appears to me that the word liberties means the districts.

Lord TENTERDEN, C. J.—I think not; the phrase, as well within liberties as without, is well known. The case in *Style* must have been decided when every Jury must consist of a certain number of hundredors; but I think, that as the law now stands, the sheriff must be directed to summon a Jury from the body of the county. The words “place or places” following “shires,” must mean places analogous to shires, such as towns and cities; and as I cannot find in this act, that the word “place” is ever put to denote the district for which the Commissioners are appointed, my strong opinion is, that the Jury must come *de corpore comitatus*; and that the Commissioners had no right to limit the sheriff in the way they have done (b). I think the plaintiff is entitled to a verdict.

Verdict for the plaintiff.—Damages, 3*l.* 6*s.*

(a) *Style*, 185, 191, 132.

(b) In the marginal note of the case of *Rex v. The Commissioners of Sewers of Somerset*, 7 Ea. 71., it is said, that “By the stat. 23 Hen. 8, c. 5, the Jury by whom a presentment is made to Commissioners of Sewers, concerning what

lands are within a level, and subject to a certain rate, ought to be summoned by the Sheriff *from the body of the county*, in pursuance of a precept directed to him from the Commissioners for that purpose.” However, that point is by no means *expressly* decided there.

Tindal, S. G., and *Brodrick*, for the plaintiff.

Scarlett, A. G., *Gurney*, and *Curwood* for the defendant.

[Attornies—*C. H. Pulley*, and *J. W. Unwin*.]

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A Jury was so summoned, and the Commissioners sent them away, and the presentments were made by standing Juries who acted for life, and of whom the Sheriff only summoned the foremen; and Lord *Ellenborough*, on this point, only said, "How it happened that a legal Jury summoned by the Sheriff from the body of the county were dismissed, and other vicious Juries substituted in their place; the Jurymen of which vicious Juries are also charged with having entered into a previous combination to make certain presentments, I shall not at present in-

quire; but any thing more alien from judicial proceedings than these, I never saw." "The Juries were not summoned by the Sheriff; the precept from the Commissioners to the Sheriff was, to summon the foremen of the Juries; and the return of the Sheriff is, that he has returned the foremen. There is no return of the Jurymen themselves. That, therefore, is not pursuant to the act of Parliament, which at any rate requires the presentment to be made by a *disinterested Jury* returned by the Sheriff, and not by a body alien altogether to the jurisdiction."

WARREN v. DIX.—*cor.* Lord ELLENBOROUGH. (1805.)

TRESPASS for taking the plaintiff's goods. Pleas—Not guilty, and justification, that the supposed trespass was committed by the authority of a Commission of Sewers, the plaintiff not paying the sum of 11. 17s. 6d. which was duly assessed upon him, by virtue of a certain act of Parliament, passed in the reign of King Henry the 8th. Replication—*De injuria*. The plaintiff was an inhabitant of Fore Street, Limehouse, and had a house, &c. there. The defendant acted under the Commissioners of Sewers for the Tower Hamlets.

The trespass was proved.

lected to traverse the presentment, and a distress was levied for the amount of the rate:—Held, at *Nisi Prius*, that these facts were a justification in an action of trespass for taking the distress, as the presentment, if duly made, and not traversed, justified the Commissioners in issuing the warrant of distress.

The presentment need not contain the name of every person benefited; if it find "All Fore Street" to be benefited, that is enough to include every one having a house there; and any one so having a house might traverse such presentment, he stating in his traverse, that his property is so situated, and that he is aggrieved by the presentment.

The warrant of distress need not recite the presentment.

The defendant is not entitled to recover his treble damages, under the stat. 23 Hen. 8, c. 5, s. 12, in case of a verdict in his favour, or a nonsuit, unless he claims them on the record.

A Jury, impaneled to inquire and present at a Court of Commissioners of Sewers, presented, that A. was benefited by the Sewers; and he received a summons to shew cause why he should not pay; he neg-

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Gibbs, S. G.—There is in this case a presentment of a Jury, that the lands now in question are benefited by this sewer; and in consequence of that presentment, which has never been traversed, the Commissioners have issued their warrant, and it would be a most extraordinary thing, if the Commissioners, who are to act upon the presentment of a Jury, could have an action of trespass brought against them, for that which they have done under such circumstances. The plaintiff might have traversed the presentment, if he was aggrieved by it; but he has not done so.

Lord ELLENBOROUGH, C. J.—The mode which the law affords to the Commissioners to be informed of their duty, is by the presentment of a Jury, and that is an authority for them to act upon; and there is an opportunity of traversing that presentment, if any one is injured by it.

Park for the plaintiff.—The warrant of distress recites nothing of this presentment.

Gibbs, S. G.—Nor need it.

Lord ELLENBOROUGH, C. J.—I think really that this presentment, if duly made, is an answer to this action.

The presentment was put in. It did not mention the plaintiff by name, but only stated that "all Fore Street" was benefited by the sewer.

Lord ELLENBOROUGH, C. J.—One thing peculiar to this statute is, that the defendant is to recover treble damages, by reason of his wrongful vexation in that behalf, with his costs; and these damages are to be assessed by the same Jury.

Erskine, for the plaintiff.—The Commissioners are not bound to tax every one who is in the presentment. There is still a jurisdiction vested in them by law, to exercise their own judgment in rating and taxing those who have been previously assessed by the Jury; and besides, the plaintiff's name is not mentioned in this presentment.

Lord ELLENBOROUGH, C. J.—"All Fore Street," are the words found in this presentment; and as he lives there, these words, in fair description, comprehend him. The question then is, whether the Commissioners are not fairly protected under those means which the law has appointed for informing their judgment. That is, the present-

ment of a Jury; and if that Jury had formed any erroneous judgment, their presentment might have been traversed; which has not been done in this case.

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Erskine, for the plaintiff.—Could we traverse it, my lord, when we were not named in it?

Lord ELLENBOROUGH, C. J.—Oh yes; the plaintiff might have described himself as the occupier of land so situated, saying he was aggrieved by virtue of that presentment assessing him in a certain sum, on the ground that he received benefit from that sewer, and that he was ready to satisfy a Jury, that he received no such benefit from it.

Erskine.—If this is the law, my lord, and if the presentment of a Jury be conclusive against all those who are included in it, then I say, that it is absolutely necessary that there should be a summons, to shew cause why the party should not pay, with notice of the presentment on which the taxation is founded; the warrant of the Commissioners ought to recite that a presentment has been made.

Garrow, for the defendant.—In this case, there was the very summons that it is said there ought to have been.

Lord ELLENBOROUGH, C. J.—If there was a summons, though it does not recite the presentment of the Jury, I think it would be sufficient.

Erskine.—Does your lordship think that the authority of the Commissioners is founded, in every particular instance, on the presentment of the Jury, so that the party has no action against the Commissioners, and that they cannot be wrong doers?

Lord ELLENBOROUGH, C. J.—They might be wrong doers, as the plaintiff might not have land; he might shew that he did not come within the operation of the act. The question whether such a sewer is of advantage to a man, so as to render him liable to be rated, is a question for the consideration of a Jury, under the direction of the Commissioners; and after the Jury have duly made their presentments, the Commissioners are to proceed to enforce them, if the matter so found be not traversed; for if it be not traversed, it is conclusive, at least it would render the party liable to taxation; and if there were any collusion between the Jury and the Commissioners, they are liable to be prosecuted criminally.

The presentment was dated, 24th March, 1803; and the precept to the Sheriff was issued on the 13th July, 1802.

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Lord ELLENBOROUGH, C. J.—The issuing of the precept is long antecedent to the presentment. It will be a question whether that sort of presentment by a Jury is agreeable to the act of Parliament.

Gibbs, S. G.—This is a continuing business.

Lord ELLENBOROUGH, C. J.—Yes; they seem to have taken up one part one day, and another part another day; and they have been employed by continuation, in different parts of this business. If I find that this Jury, convened in July, proceeded by adjourned meetings to different parts of the business, I should think it sufficient; but if I find them going on year after year, I think they cannot do that.

Erskine.—My lord, considering the novelty of this point—

Lord ELLENBOROUGH, C. J.—I shall reserve the whole. It will be as well to make a case of it. It is a matter of some novelty.

Gibbs, S. G.—Under the act of Parliament, it will be necessary for us to have some damages found for the defendant.

Lord ELLENBOROUGH, C. J.—(Having referred to the statute, 23 Hen. 8, c. 5).—This, to be sure, is very singular; but I do not see how I can give the defendant damages, who makes no claim of them on the record, and therefore I do not wish to introduce such an anomaly.

Gibbs, S. G.—If judgment is given for the defendant, I hope that your Lordship will certify that this was an action brought against the Commissioners of Sewers.

Lord ELLENBOROUGH, C. J., directed a verdict for the plaintiff for 1*l.* damages, subject to a special case, which was never argued, as the matter was compromised.

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MEAGOE v. SIMMONS.

Dec. 15th.

ASSUMPSIT by the plaintiff as the indorsee against the defendant as the acceptor of a bill of exchange for 1000*l.*, drawn by Augustus De Lisle.

The plaintiff relied on the formal proofs. The defence was, that the plaintiff, when he discounted the bill, received more than five *per cent.* for so doing.

To prove the usury, M. De Lisle was called. In cross-examination, he was asked, whether he had not been sentenced to two years' imprisonment by a French Court of Justice? This he would not admit; and, for the purpose of refreshing his memory, the plaintiff's counsel put into his hand the sentence of the French Court.

Scarlett, for the defendant, objected that the witness could not be allowed to refresh his memory from any paper not of his own hand-writing.

Lord TENTERDEN, C. J.—That is certainly the usual course. This document may be made evidence in another way.

The witness gave the paper back without looking at it.

For the plaintiff, a witness named Coates was called in reply, to disprove the usury. He was cross-examined as to something he had said relative to the trial of a former action, which action was between the same parties, on a precisely similar bill, which it was alleged had been discounted by the plaintiff at the same time as the bill which was the subject of the present action, the plaintiff taking more than five *per cent.* on each. The witness denied the conversation imputed to him.

plaintiff's counsel make out a *prima facie* case, and the defendant's counsel proves a case of usury and, after the plaintiff has called a witness in reply to deny the usury, a witness be called to contradict the plaintiff's witness in reply, the defendant's counsel is entitled to observe on the plaintiff's evidence in reply, and on the contradiction; and the plaintiff's counsel then has a general reply.

The general rule is, that no paper can be put into the hand of a witness to refresh his memory, which is not of his own hand-writing, therefore, if he is asked whether he has not been imprisoned in France, the counsel asking this cannot put into his hand an authenticated copy of the sentence of the French Court.

If in an action on a bill, it has been opened, that the bill in question, at the same time with another bill, was usuriously discounted by the plaintiff, and after a *prima facie* case of usury made out, a witness, who is called to disprove it, is asked as to some thing he has said respecting a trial relative to the other bill, this is not a matter so far collateral, that the other side may not call a witness to contradict him as to what he said. If in an action on a bill the

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Scarlett, A. G., for the defendant, wished to call a witness to prove that Coates had said what was imputed, relative to the trial of the former case.

Gurney, contra.—As any thing respecting the trial of the former cause must be a collateral matter, the defendant's counsel must take the answer, and is not at liberty to call witnesses to contradict Mr. Coates.

Lord TENTERDEN, C. J.—If the conversation was as to a collateral matter, it could not be asked; but as it is respecting another bill which was discounted at the same time, and under the same circumstances, I do not think it is collateral matter.

The witness was examined to contradict Mr. Coates.

In this case the plaintiff's counsel had opened and proved the bill. The defendant's counsel opened a defence of usury, and called witnesses to prove it; witnesses were then called by the plaintiff, in reply, to disprove the usury; and a witness was after that called for the defendant, for the purpose of contradicting one of the witnesses in reply. The defendant's counsel then replied on the evidence given in reply, and on the contradiction given to a part of that evidence, and the plaintiff's counsel then made a general reply (a).

Verdict for the plaintiff.

Gurney and Parke, for the plaintiff.

Scarlett, A. G., *Chitty*, and *Kelly*, for the defendant.

(a) In the case of *Goodtitle* dem. *Revett v. Braham*, 4 T. R. 496, which was a trial at bar, the lessor of the plaintiff, who claimed as heir at law, proved his pedigree and stopped. The defendant set up a new case which the plaintiff answered by evidence which ultimately went to the Jury. The

Court held, that the defendant should have the general reply.

In the case of *Rex v. Bignold*, 4 D. & R. 70, it was held, that if the defendant's counsel open mere facts, but call no witnesses, the plaintiff's counsel will be still entitled to the general reply. See *Fairlie v. Denton*, *post*, p. 103.

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BEFORE LORD TENTERDEN, C. J.

CRAMMOND v. CROUCH.

Jan. 8th.

ASSUMPSIT.—The first count of the declaration was on a special agreement, that, in consideration that the plaintiff would investigate the affairs of one Parsons, a bankrupt, the defendant, and certain other persons who signed this agreement, would each of them pay an equal share of the reasonable charges to be made by the plaintiff for so doing. There was also a count for work and labour, as a certificated conveyancer (a). Plea—General issue.

The plaintiff was a certificated conveyancer; and it appeared, that the defendant and others, being creditors of Parsons, a bankrupt, signed a resolution, by which they agreed that an investigation should be made of the bankrupt's affairs; and they thereby empowered the plaintiff to take such steps as he should think necessary; and each of them agreed to pay him an equal proportion of the reasonable charges to be made by him. It was proved, that the plaintiff waited on various persons to acquire information respecting the state of the bankrupt's property, and also attended Mr. Rose, the barrister, to consult him on the propriety of presenting a petition to the Lord Chancellor, to stay the allowance of the bank-

If a certificated conveyancer induce a creditor of a bankrupt to employ him in investigating a bankrupt's affairs, by representing himself to be an attorney and solicitor, he is not entitled to recover any thing for his trouble: and even, if he paid fees to counsel in the course of the investigation, he cannot recover them of his employer as money paid, laid out, and expended.

(a) It was at one time considered, that a certificated conveyancer could not recover his fees in an action; but in the case of *Poncher v. Norman*, 5 D. & R. 648, the Court of King's Bench held, that

a certificated conveyancer might maintain an action for his fees the same as a surgeon or an attorney, overruling the case of *Jenkins v. Slade*, ante, vol. 1, 270.

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rupt's certificate. However, it appeared from the cross-examination of one of the plaintiff's own witnesses, that the plaintiff represented himself in the business as an attorney and solicitor.

LORD TENTERDEN, C. J.—I am quite clear that the plaintiff cannot recover. His own witness proves that the plaintiff held himself out as an attorney and solicitor; and besides that, I see his bill is drawn out exactly like an attorney's bill—Attendances, *3s. 4d.* and *6s. 8d.*, and so forth.

Denman, C. S.—We have proof of the plaintiff's having paid Mr. Rose his fee; and I submit that at least we may recover that.

LORD TENTERDEN, C. J.—I think not. The plaintiff held himself out to be an attorney, and induced the defendant and the other creditors to employ him by means of a misrepresentation of his own situation. The plaintiff must be called (*a*).

Nonsuit.

Denman, C. S., and *Chitty*, for the plaintiff.

Gurney and *Kelly*, for the defendant.

[Attornies.—*Constable & K.*, and *Pope*.]

(*a*) See the case of *Steed v. Henley*, *ante*, Vol. 1, p. 574.

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MEUX and Others v. HUMPHRIES.

Jan. 9th.

ASSUMPSIT by the plaintiffs as payees against the defendant as the maker of a promissory note for 317*l.* 19*s.* 6*d.* There was also a count for goods sold. Plea—General issue.

It appeared, that the consideration of the note was beer supplied by the firm of Messrs. Meux & Co. the plaintiffs, for a public house called the Joiners' Arms. The beer was supplied on the credit of the defendant; but one of the witnesses stated, in cross-examination, that the person licensed to keep the Joiners' Arms as a public house, and who in fact did keep it, was Mrs. Sessa, the niece of the defendant.

A brewer, who supplies beer to a public house, cannot charge any person as a primary debtor but the person licensed to keep the house: and if beer be so supplied on the credit of a person not licensed, the brewer cannot recover against such person, on the ground that it is a fraud on the Excise.

Lord TENTERDEN, C. J.—I am clearly of opinion, that the brewers cannot charge any one as their debtor, in the first instance, except the party who is licensed to keep the house, because it is a fraud on the Excise. The brewer may hold any person, who is not licensed, liable as a collateral security, but not as the primary debtor.

The license was not in Court; and after some other parts of the case were gone into, the parties agreed upon a compromise; and

A juror was withdrawn.

F. Pollock, and *Chitty*, for the plaintiffs.

Scarlett, A. G., and *Platt*, for the defendant.

[Attornies—*Holmer*, and *Sandom*.]

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Jan. 10th.

SHUTE and Others v. ROBINS and Others.

If a bill drawn by a banker in the country, on a banker in town, in favour of A. payable after sight, be indorsed by A. to the defendants, who indorse to the plaintiffs seven days after the date of the bill, and the plaintiffs delay presenting it for acceptance for four days; it will be left to the Jury to say whether the plaintiffs have been guilty of unreasonable delay, and in considering this, the Jury may infer, from the defendant himself having kept the bill so long unaccepted, that it is not the course of business to present such bills for acceptance immediately after the party receives them.

ASSUMPSIT by the plaintiffs as indorsees, against the defendants as indorsers, of a bill of exchange for 100*l.*, dated the 12th day of November, 1825; payable 20 days after sight. The bill was drawn at Plymouth by Sir W. Elford & Co., bankers there, on Messrs. Barnett & Co., bankers in London, in favour of Mr. William Couling, who indorsed it to the defendants, by whom it was indorsed to the plaintiffs.

The facts proved were these:—The plaintiffs were distillers at Bristol, and the defendants bankers at Liskeard. Mr. Couling, the payee, lived at St. Germain's, which is 12 miles from Liskeard, the latter place being 20 miles from Plymouth. The plaintiffs' traveller, Mr. Bezley, being at Liskeard, and wishing to have a bill payable in London, in exchange for provincial cash notes, on Thursday, the 17th of November, 1825, received this bill from the defendants just as he had on other occasions received similar bills; and it being his custom to transmit bills to his employers, the plaintiffs, only once a-week, he did not transmit this bill to the plaintiffs till the ensuing Thursday, November the 24th. This bill, therefore, reached them, at Bristol, on Friday the 25th, after the London post had gone out. It appeared that there is no post from Bristol to London on Saturdays; and on Tuesday, the 29th of November, the bill was paid by the plaintiffs to Messrs. Stuckey & Co., their bankers, at Bristol, to be transmitted to London. On Thursday, the 24th of November, the bank of Sir W. Elford & Co., at Plymouth, stopped payment; and when this bill was presented for acceptance on the 1st of December, Messrs. Barnett refused to accept it; and it was proved that they had refused to accept any bill of Sir W. Elford & Co., presented on or after Monday, the 28th of November; and that the last day on which Messrs. Barnett & Co. accepted bills drawn on them by that firm, was Saturday, the 26th of November.

Gurney for the defendants, on this evidence contended that the delay on the part of the plaintiffs' agent, Mr. Bezley, in transmitting the bill, was such laches on the part of the plaintiffs, as to exonerate the defendants, the indorsers; for that, if Mr. Bezley had transmitted the bill to his employers, on the day after that on which he received it, namely, the 18th of November, it would have arrived in London in time to have been accepted by Messrs. Barnett & Co., as they accepted all such bills presented on or before the 26th; and that if proper diligence had been used, this bill might have got to Bristol, so as to have been forwarded from that place to London, on Monday, the 21st, and have been presented on Tuesday, the 22nd; and if it had been presented on that day, or indeed on any day up to the 26th inclusive, it was in proof that it would have been accepted in due course, by Messrs. Barnett.

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Scarlett, A. G., in reply.—The most that can be alleged against the plaintiffs, is a delay of only four days; and this delay is said to be such laches as will discharge the indorsers. Our traveller receives the bill on Thursday the 17th; he was not bound to send it till the 18th, which was Friday, and it then could not arrive at Bristol till the Saturday. The bankers at Bristol could not have forwarded it from that place till Monday the 21st, and it could not arrive in London till Tuesday the 22nd; now as the bankers in London were not bound to present it till the next day, which was Wednesday, they could not by the greatest diligence have presented this bill for acceptance, more than four days antecedent to the time when Messrs. Barnetts ceased to accept.

Lord TENTERDEN, C. J.—The bill could not have got to London till Tuesday the 22nd; and I go with you in your proposition, that the party need not present for acceptance on the very day on which he receives the bill.

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Scarlett, A. G.—Now what was the conduct of the defendants themselves? This bill bears date the 12th of November, and as it is not proved when it was indorsed, and is proved that Mr. Couling lived only twelve miles from the defendants, I have a right to assume that it was indorsed on the day on which it bears date. The defendants have it in their possession till the 17th, and yet they say that we are to lose our right to sue on the bill by reason of a delay of only four days. The question is, whether there is so much delay as will prevent us from recovering. Now, if there is, the defendants have contributed to it by their act, they being guilty of still greater delay than we. However, I do not mean to accuse them of neglect, and I only mention this to shew that it is not expected that a holder of a bill of this sort, should send it for acceptance on the day he receives it, or on the day after.—In the case of *Fry v. Hill (a)*, it was held, that a bill payable after sight, must be presented in a reasonable time. I therefore submit, that we were not guilty of such unreasonable delay as will prevent us from recovering against the defendants.

Lord TENTERDEN, C. J. (In summing up).—In this case the defendants contend that there was such unreasonable delay in the presenting of this bill for acceptance, as will prevent the plaintiffs from recovering in the present action. This is, I think, a mixed question of law and fact, and to decide it, we must look at the bill itself, and must also take into consideration the ordinary practice relative to such bills. This bill is drawn by bankers in the country, upon bankers in London; and as this very bill of the date of the 12th of November, is paid by the defendants to the plaintiffs' traveller as late as the 17th, you may reasonably infer that it is neither expected nor considered necessary to present such a bill as this so speedily as if it

(a) 7 Taunt. 397.

were the bill of any private party; in short, that bills of this kind are considered as a part of the circulation of the country: and the best advice that I can give you is, that, taking into consideration the nature of the bill itself, and the time the defendants themselves had kept it, you will say whether, according to the ordinary course of business, you think that the plaintiffs have been guilty of such unreasonable delay in presenting this bill for acceptance as will discharge the defendants as the indorsers of it. If you think the plaintiffs have been guilty of such unreasonable delay, you will find for the defendants, but if you think, under all the circumstances, that they have not, and adopt my suggestion, you will find for the plaintiffs.

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Verdict for the plaintiffs.

Scarlett, A. G., and Chitty, for the plaintiffs.

Gurney, and Coleridge, for the defendants.

[Attornies—*Evans & S., and Coode.*]

See the cases of *Muilman v. v. Harden*, 7 Taunt. 159. *Fry v. D'Eguino*, 2 H. B. 565. *Goupy Hill*, 7 Taunt. 397.

MARTIN v. BRIDGES and ELMORE.

Jan. 10th.

MONEY had and received. The defendant Bridges pleaded—*First*, the general issue—*Second*, the statute of limitations. The defendant Elmore pleaded his bankruptcy in the year 1819.

Gurney opened, that the plaintiff had been a seaman on board the ship *Nimrod*, of which the defendants had become owners. That this ship had been, in the year 1811, sent out to the Southern whale fishery, at which time she

If one of two partners has become bankrupt, and obtained his certificate, and after that he acknowledges a debt due to the plaintiff by his partner and himself; this acknowledgment is not sufficient to take the case out of the statute of limitations, in an action against him and his partner for such debt, if his partner plead the statute of limitations, and he plead his bankruptcy.

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belonged to a person of whom the defendants had purchased her while in the South Seas. That the plaintiff was to receive a 95th share of the net profits of the voyage; and that, while in the South Seas, two prizes were taken by the *Nimrod*. And that in the year 1813 an account was made out, on which the plaintiff was paid by the defendants a sum equal to his share of the proceeds, deducting the duties and expenses; but that, in the year 1814, the defendants petitioned the Crown for a remission of the duties on the cargo of the *Nimrod*, on account of the meritorious conduct of the crew in respect of the prizes; and in the course of that year the duties, amounting to about 14000*l.* were remitted by the Crown, and paid to the defendants. Of this sum the plaintiff claimed a 95th share. To take the case out of the statute of limitations, the plaintiff's counsel relied on an acknowledgment by the defendant Elmore, which, it was contended, would be good against both the defendants, as they were partners.

Lord TENTERDEN, C. J.—Was the acknowledgment after the bankruptcy of the defendant Elmore?

Gurney.—Yes, my Lord.

Lord TENTERDEN, C. J.—I would put it to you, whether an acknowledgment made by a person who is not himself liable at the time when he makes it, is sufficient to take the case out of the statute of limitations, so as to charge his partner.

The certificate of the defendant Elmore was put in, and by that it appeared, that he became bankrupt in the year 1819.

Gurney.—It was a matter of option whether Mr. Elmore would rely on his certificate or not.

Lord TENTERDEN, C. J.—I must presume that every man will set up a discharge, if he has one; and you see that the defendant Elmore, does in fact rely on his certificate.

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Platt.—A promise by a bankrupt, after his bankruptcy, to pay a debt due before, must now be in writing; but before the statute 6 Geo. 4, c. 16, a verbal promise would do; and if Mr. Elmore has made such a promise he will be liable.

Lord TENTERDEN, C. J.—Mr. *Gurney* has not opened any express promise.

Gurney.—I am in a condition to prove that Mr. Elmore said, that the money had been received, and that the men ought to have shares of it.

Lord TENTERDEN, C. J.—I am afraid there is nothing to take the case out of the statute.

Nonsuit.

Gurney, and *Platt*, for the plaintiff.

Scarlett, A. G., for the defendants.

[Attornies— *E. Jacob*, and *Evans & S.*]

TUCKER and Another, Assignees of HICKMAN, a Bankrupt Jan. 11th.
v. BARROW, Gent., one &c.

ASSUMPSIT. The *first* count of the declaration was for money lent by the bankrupt; *Second*, money paid, laid

file payment made by a bankrupt more than two months before the issuing of the commission, the receiver having no notice of an act of bankruptcy, is protected, and the fact of his knowing the bankrupt to be in difficulties makes no difference. An admission by a party in his examination before Commissioners of bankruptcy, that he has received a sum of money belonging to the bankrupt after an act of bankruptcy, is not evidence of an account stated with the assignees; and the most that an examination before the Commissioners does, is to make out a *prima facie* case for the assignees, that the party has so much of the bankrupt's money in his hands so as to call on him for an explanation; but if there be no count for money had and received to the use of the assignees, they must be nonsuited. Whether the act of bankruptcy, by lying in prison 21 days, relates to the first of the 21 days, or only to the last of them?—*Quere*.

Under the 81st
sect. of the bank-
rupt act, 6 Geo.
4, c. 16, a bond

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out and expended by the bankrupt; *Third*, money had and received *to the use of the bankrupt*; *Fourth*, on an account stated with the bankrupt; *Fifth*, a count for money lent, money paid, money had and received *to the use of the bankrupt*, and on an account stated with him, laying a promise, after the bankruptcy, to pay the plaintiffs as assignees; *Sixth*, an account *stated with the plaintiffs*, as assignees. Plea—General issue.

The commission was dated May 23rd, 1826; and the act of bankruptcy relied on was, a lying in prison from the 30th of January, 1826, to the 16th of June in the same year.

The plaintiff's counsel suggested that it was doubtful whether, under the 5th sect. of the bankrupt act, 6 Geo. 4, c. 16, the act of bankruptcy, by lying in prison, related to the first of the twenty-one days of the lying in prison, as under the former statutes, or to the last of the twenty-one days only.

Lord TENTERDEN, C. J.—I will reserve that point if it become material (*a*).

(*a*) By the stat. 6 Geo. 4, c. 16, s. 5, it is enacted, "That if any such trader, having been arrested or committed to prison for debt, or on any attachment for non-payment of money, shall, upon such or any other arrest or commitment for debt or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days; or, having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him and not discharged, every such trader shall be thereby deemed to have committed an act of bankruptcy; or if any such trader having been *arrested, committed, or detained* for debt, shall escape out

of prison or custody, *every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention.* Provided, that if any such trader shall be in prison at the time of the commencement of this act, such trader shall not be deemed to have committed an act of bankruptcy by lying in prison, until he shall have lain in prison for the period of two months." The doubt is, whether the words in italics, beginning *every such trader*, extend over the whole clause, or whether they relate only to persons arrested, committed, or detained for debt, who shall escape out of prison or custody.

To shew that a sum of 75*l.* 9*s.*, belonging to the bankrupt, was paid into the hands of the defendant on the 10th of February, 1826, his examination before the commissioners of bankrupt was read. It contained (*inter alia*) the following statement:—

Qu.—Have you received any money on account of the bankrupt?

Ans.—Yes; it appears by the auctioneer's account that I received the sum of 75*l.* 9*s.* on account of the bankrupt.

Qu.—When was this sum received by you?

Ans.—I believe about the 10th of February last.

Qu.—Have you any doubt that you received a sum of 75*l.* 9*s.* on the 10th of February?

Ans.—I have very little doubt of it.

Lord TENTERDEN, C. J.—This money is received more than two months before the issuing of the commission, and under the 81st sect. of the stat. 6 Geo. 4, c. 16 (*b*), *bond fide* transactions, two months before a commission issues, are good, unless the party has notice of a prior act of bankruptcy; knowledge of the party's insolvency, will not do.

(*b*) By that section it is enacted, "That all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt, *bond fide* made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bond fide* executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed: provided the person or persons so dealing with such bank-

rupt, or at whose suit or on whose account such execution or attachment shall have issued, had not, at the time of such conveyance, contract, dealing or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed: Provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission, within two calendar months next after it shall have been superseded, no such conveyance, contract, dealing, or transaction, execution or attachment, shall be valid, unless

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And there is no act of bankruptcy applicable to this case, unless the first day of the imprisonment is the time at which we are to consider the act of bankruptcy as committed: and if that be so, the plaintiffs cannot recover in this action, as there is no count for money had and received to the use of the assignees.

Deacon, for the plaintiffs.—Does your Lordship think that the 81st sect. of the bankrupt act extends to payments made by the bankrupt?

Lord TENTERDEN, C. J.—The legislature uses the word “dealings,” and I do not know of any larger term that could have been used. Knowing the party to be in difficulties is nothing at all under this act, if the transaction is not within two months of the suing out of the commission.

For the defendant it was proved, that he had, on the 10th of February, received the sum of 75*l.* 9*s.*, which sum was the proceeds of the sale of the bankrupt's goods; and that he paid the bankrupt's rent and a sum due to himself out of it, and then handed the residue to the bankrupt, while in prison.

On this evidence Lord TENTERDEN, C. J., directed a

Nonsuit.

F. Pollock, and *Deacon*, for the plaintiffs.

Brougham, and *Chitty*, for the defendant.

[Attornies—*Stevens*, *W. & W.*, and *Squire*.]

made, entered into, executed or months before the issuing the first
 levied more than two calendar commission.”

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Jan. 23d.

BEFORE LORD TENTERDEN, C. J., BAYLEY, HOLROYD, &
LITTLÉDALE, JS.—In Bank.

F. Pollock now moved for a new trial, on the ground that the examination of the defendant before the commissioners (above set forth) was evidence upon the count upon an account stated with the assignees; and he contended that an admission of the receipt of money belonging to a bankrupt after an act of bankruptcy, was evidence of a subsisting debt due to such bankrupt's assignees; and he cited the cases of *Knowles v. Michell (a)*, and *Highmore v. Primrose (b)*.

BAYLEY, J.—It seems to me that this case is distinguishable from both the cases cited. I agree, that if there be an acknowledgment of a subsisting debt, that is evidence on the account stated. In one of the cases cited there was an acknowledgment of a specific sum of nine guineas being due, and in the other the acknowledgment went specifically to a bill of exchange. It is true that the defendant says, in this case, that he has received a sum of money, but he does not acknowledge it as a subsisting debt due to the assignees, nor say that he is liable to pay any thing to them; and if that be so, I cannot say, that he accounted with the assignees, and was found in arrear.

(a) 13 Ea. 249. In this case the plaintiffs declared for goods sold and upon an account stated. The action was brought for the price of trees sold when growing; but as it was proved, that the defendant admitted that a sum of nine guineas was due to the plaintiff, the Court held that the plaintiff was entitled to recover that sum on the account stated.

(b) 5 M. & S. 65. In this case it was held, that the acceptor's admission of his liability to pay the plaintiff the amount of a bill of exchange, of which the latter was indorsee, was sufficient to enable the plaintiff to recover on the account stated, there being a variance as to the count on the bill.

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HOLROYD, J., concurred.

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LITLEDALE, J.—I should have much doubt whether any thing said in an examination before commissioners of bankrupt would be evidence on the account stated. However, it may be evidence of money had and received. The party is brought there by compulsion, and he is compelled to answer questions, which is nothing like accounting and being found in arrear. I think the admission, to support an account stated, must be either to the person to whom the money is owing, or some one sent by him. Looking at the form of the count on an account stated, it is not at all suitable to the present evidence.

Lord TENTERDEN, C. J.—The most that an examination before commissioners of bankrupt does, is to make out a *prima facie* case for the assignees, that the defendant has so much of the bankrupt's money in his hands, so as to call on him for an explanation.

Rule refused.

Jan. 11th. BEDFORD and Others, Assignees of COHEN, a Bankrupt, v. PERKINS.

MONEY had and received by the defendant to the use of the assignees. Plea—General issue.

It appeared that the bankrupt, who was the owner of certain houses, had given the defendant, a broker, authority to distrain on the tenants of those houses for rent. The bankrupt owed a person named Hudeveurk a sum of money; and the latter called on the bankrupt to pay it; A., being a trader, before any act of bankruptcy, directed his broker, who had authority to distrain for rents due to him, to pay a certain sum to B. in satisfaction of a debt, and the broker, *bond fide*, agreed with B. to pay him as soon as he received the rents, and after this A. became bankrupt:—Held, that the assignees of A. could not recover this sum from the broker, though he did not in fact pay it over to B. till after the commission issued.

but instead of doing so, the bankrupt directed the defendant to pay him out of the rents; and the defendant told Hudeveurk that he had not the money then, but agreed to pay him the amount as soon as he got the money from the tenants. All this occurred before Cohen, the bankrupt, had committed any act of bankruptcy. The defendant did not, in fact, pay over the money to, nor was it demanded by Hudeveurk before the suing out of the commission.

On the part of the plaintiff it was contended, that this was money had and received to the use of the assignees.

Scarlett, A. G., contra, argued, that as the transaction was *bond fide*, and as the defendant agreed to pay the sum to Hudeveurk, as soon as he received it, he was bound to do so; and therefore he never at any time held the money for the assignees.

LORD TENTERDEN, C. J.—As this was a *bond fide* transaction, the question is, whether, if there had been no bankruptcy, Cohen could have recovered this money from the defendant. I am of opinion that he could not; and I think that what passed between the parties as to the paying it to Mr. Hudeveurk, is such an appropriation of it as will prevent the plaintiffs from recovering.

Verdict for the defendant.

Campbell and Hutchinson, for the plaintiffs.

Scarlett, A. G., for the defendant.

[Attornies—*Hutchison*, and In person.]

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MULLETT *v.* HUTCHISON.

A paper, stating that the party signing it has certain bills in his hands, which he has "to get discounted, or return on demand," does not require an agreement stamp.

ASSUMPSIT. The declaration stated, that certain bills had been indorsed by the plaintiff, and delivered to the defendant, which he undertook to procure to be discounted, or to return to the plaintiff. Breach—That the defendant did not get them discounted, and would not return them, but on the contrary thereof converted the said bills to his own use. Plea—General issue.

On the part of the plaintiff, an unstamped paper, signed by the defendant, was offered in evidence. It was in the following terms:—

"Sir,—I have in my hands three bills, which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted, or return on demand.

John Hutchison,

"To Mr. Mullett.

6th June, 1826."

Kelly, for the defendant, objected, that by this paper the defendant agreed to do one of two things, *viz.* either to get the bills discounted, or to return them; and therefore it was not admissible in evidence without an agreement stamp.

Fish, *contra*, relied on the case of *Tomkins v. Ashby (a)*,

(a) 6 B. & C. 541. In that case the plaintiff had deposited money with the defendant, who gave a memorandum in the following terms:—

"September 25th, 1824.

"Mr. Tomkins has left in my hands 200*l.*"

It was objected that this paper ought to have borne a receipt stamp; but the Court held, that it did not require any stamp at all:

and Lord *Tenterden* intimated, that the only receipts that required a stamp, were those which imported that something formerly due had been discharged; and his Lordship also said, that acts of Parliament, imposing duties, are to be so construed, as not to make any instruments liable to them, unless manifestly within the intention of the Legislature.

and contended, that the paper contained a mere acknowledgment that the defendant had the bills in his hands, but that, by the terms of it, the defendant did not agree to do any thing.

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Lord TENTERDEN, C. J.—I shall receive the paper in evidence; but I will give Mr. *Kelly* leave to move to enter a nonsuit.

Verdict for the plaintiff.

Fisk, for the plaintiff.

Kelly, for the defendant.

[Attornies—*Clift & F.*, and *Thomas*.]

IN the ensuing Term, *Kelly* moved, in pursuance of the leave given at the trial; but the Court refused the rule, being of opinion that the paper received in evidence was not an agreement, and did not require any stamp.

HILLYARD v. MOUNT.

Jan. 12th.

DEBT on ship's articles under seal, dated the 21st day of April, 1822, by which it was agreed, that the plaintiff should serve as a seaman on board the ship *Mary*, a South Sea whaler, of which the defendant was the owner, on a voyage to the South Seas, and that the plaintiff should receive a one hundred and fortieth share of the net proceeds of the cargo. The declaration then proceeded to state, that the plaintiff duly served, and that his share amounted to 60%. There were also counts for wages for

By a clause in the ship's articles of a South Sea whaler, the seamen serving on board were to lose their wages if they did not return with the ship to the port of London. After serving 27 months, some of the seamen were, with the consent of the captain, ex-

changed into another ship for others belonging to that ship:—Held, that if these seamen lost their wages under the articles, they could recover a reasonable compensation for their services, on the count for work and labour.

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work and labour, and the money counts. The defendant pleaded the general issue "*nil debet*" to all but the special count; and to that he pleaded, that it was agreed by the ship's articles, that if any seaman did not return with the ship to the port of London, he should forfeit and lose his proportion of the proceeds of the cargo; and averred, that the plaintiff did not return with the ship to the port of London (a). Replication—That the plaintiff had license to quit the ship. Rejoinder—Denying the license.

It appeared that the plaintiff executed the articles, and performed his duty on board the ship *Mary* till the month of July, 1824, but that on the return of the ship after the active part of her voyage was completed, they, off the coast of Japan, met with the ship *Harlestone*, another whaler, outward-bound, and that it was agreed between the captain of the *Mary*, and the captain of the *Harlestone*, that certain men of the *Mary* (of whom the plaintiff was one) should be exchanged into the *Harlestone*, and that the *Mary* should bring home some of the *Harlestone's* men who were sick: and it was proved, that before the plaintiff left the *Mary*, the captain stated, that he was discharged with his (the captain's) free will, and that he was not to lose his one hundred and fortieth share of the cargo, and that the captain sent his boat to convey the plaintiff on board the *Harlestone*.

The ship's articles were put in, and contained a clause, as stated in the plea.

Brougham, for the defendant, was proceeding to argue that this was an answer to the present action.

LORD TENTERDEN, C. J.—Mr. *Brougham*, you contend, that, under these articles, if the plaintiff does not come

(a) There were seven other special count; but no question special pleas, and the general issue *non est factum* pleaded to the above stated.

home with the ship, whether he quits her with leave or not, he loses all his wages. There is certainly a clause in the articles to that effect: however, the question is not raised on these pleadings, because the issue is taken on license or no license; but still, taking that point to be in your favour, and taking it, that, by leaving the ship with the consent of the captain, the plaintiff loses his right to wages under the articles, I am most clearly of opinion, that he may recover a reasonable compensation for his services under the common counts contained in this declaration. It is true, that if the issue of license or no license is found for the plaintiff, you may move to enter up judgment *non obstante veredicto*, but then the other party may have their verdict entered on the count for work and labour; for if the plaintiff does not recover under the ship's articles, he is most clearly entitled to a reasonable compensation for so many months' labour as he has performed.

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Verdict for the plaintiff, subject to a reference as to the amount; and the arbitrator was, on the face of his award, to raise the question, whether, as part of the rigging was cut away in a storm, the plaintiff was liable to general average.

Scarlett, A. G., and *Comyn*, for the plaintiff.

Brougham and *Parke*, for the defendant.

[Attornies—*Jones & H.*, and *Cox.*]

See the case of *Train v. Bennett*, *ante*, p. 3.

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BENNETT v. WOMACK.

A *net* rent is a sum to be paid to the landlord clear of all deductions; and if one agree to take a lease at a *net* rent, he cannot object that the lease contains a covenant for him to pay the land and sewer taxes.

What are *usual covenants* is a question of fact for the Jury, and not a question of construction for the Court.

ASSUMPSIT on a written agreement to take an assignment of a lease of a public house. The first special count of the declaration averred that the plaintiff was ready to perform his part of the agreement, but that the defendant, not regarding &c. would not accept the assignment. There were other special counts, and the money counts. Plea—General issue.

The agreement, which was signed by both the parties, was in the following form:—

“ This agreement witnesseth, that Charles Bennett, of Brook Hill, Clerkenwell, Victualler, doth agree to sell to William Womack, of Hoxton, the lease and goodwill in trade, of the house and premises now occupied by him, known by the sign of the Coach and Horses, situate in Brook Hill aforesaid, for the sum of 275*l.*, as he holds the same, at the *net annual rent* of 27*l.*, for an unexpired term of at least eleven years and three quarters, from this time; and under *common and usual covenants*; and also such of his household goods, &c. &c.; and the said William Womack doth hereby agree to take a proper assignment of the said lease and premises as above described, *provided there are no other than common and usual covenants* contained therein; and that he will pay unto the said Charles Bennett, the said sum of 275*l.* for the same, &c. &c.”

This agreement was dated on the 17th of January, 1827; and was to be carried into effect on the 1st of February, in the same year. It was proved that an abstract of the plaintiff's title was delivered on the 30th of January, and that, on the morning of the 1st of February, the defendant said that he repented of his bargain, and would not complete the purchase; and it was also proved, that he did not come to the place appointed during any part of the day.

Kelly, for the defendant.—By this agreement the de-

fendant only agrees to take an assignment with the common and usual covenants. Now, by the abstract delivered, it appears that the original lease contains a covenant by the tenant to pay the "land-tax, sewers-rate, and all other taxes, rates, duties, and assessments whatsoever." Now, the land-tax and sewers-rate are landlord's taxes, and a covenant by a tenant to pay them certainly cannot be considered usual. There is besides in the original lease a proviso for a re-entry in case the rent is in arrear for 15 days, or in case the premises should be used for any other trade than that of a licensed victualler. If this house had been used by a linen draper, and there had been a covenant that no other trade should be carried on there, it would be manifestly a covenant in restraint of trade; but this is worse still, because this house cannot be carried on as a victualling house, without a license, the granting of which is discretionary in the Justices.

Lord TENTERDEN, C. J.—The question is, whether these are usual covenants in such a lease.

Kelly.—In the case of *Church v. Brown* (a), Lord Eldon says, "The safest rule for property is, that a person shall be taken to grant the interest in an estate which he proposes to convey, or the lease he proposes to make; and that nothing which flows out of that interest as an incident, is to be done away by loose expressions to be construed by facts more loose; that it is upon the party who has forborne to insert a covenant for his own benefit, to shew his title to it; and that it is safer to require the lessor to protect himself by *express stipulation*, than for Courts of Equity to hold, that contracting parties shall insert *not restraints expressed by the contract or implied by law*, but such, more or less in number, as individual conveyancers shall from day to day prescribe as proper to be imposed

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(a) 15 Ves. 268.

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upon the lessee; and that all those restraints so imposed from time to time, are to be introduced as the aggregate of the agreement." And I therefore submit, that any thing which goes to limit the enjoyment of the term, by the tenant, should be expressly stipulated for by the landlord.

Lord TENTERDEN, C. J.—I have no doubt on the first objection. Here the landlord is to have a *net* annual rent of 27*l.*; now, that he will not have, unless the tenant pays the land-tax and sewers-rate. As to the covenant for re-entry for non-payment of rent, that is quite usual, though in some cases it is after a lapse of a greater, and in others a less number of days from the time of the rent becoming due. With regard to the stipulation, that no other business shall be carried on than that of a licensed victualler, I have some doubt, and I am ready to hear evidence on either side.

A clerk of the plaintiff's attornies proved, that he was in the habit of seeing a great number of public-house leases, and that this stipulation was contained in six leases out of every ten.

Kelly.—I submit that, under the case of *Church v. Brown*, this is a question of construction for the Court, and not a question of fact for the Jury.

Lord TENTERDEN, C. J.—I am clearly of opinion, that what is a usual covenant is a question of fact for the Jury. If there had not been the word "*net*," I should have been with the defendant on the first objection; a *net* rent means a sum clear of all deductions: and with regard to the other point, as it is proved that more than half the leases contain such a covenant, there being no evidence on the other side, I shall recommend the Jury to say that it is usual.

Verdict for the plaintiff.

Scarlett, A. G., and Chilton, for the plaintiff.

Kelly, for the defendant.

[Attornies—*Vandercom & C., and Mills.*]

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In the ensuing term *Kelly* moved to set aside the verdict and enter a nonsuit, but the Court refused a rule.

Yates and Another, Assignees of MARSHALL, a Bankrupt,
v. *CARNSEW.*

Jan. 14th.

TROVER for woollen cloths. Plea—General issue.

The commission of bankrupt which issued against Marshall was dated the 22nd of November, 1824, and it was proved that he committed an act of bankruptcy on the 5th of January in that year.

The case on the part of the plaintiffs was, that the defendant had bought the cloths when he must have had a knowledge that Marshall was insolvent (a).

If a person who has numerous dealings with a bankrupt, on being examined before the Commissioners, does not bring his books with him, but, while under examination, consents that the accountant to the commission shall

make extracts from them; these extracts cannot be used as evidence against him, without also reading his examination. If one buys goods of a bankrupt under such circumstances as will entitle his assignees to maintain trover for them, such buying is in itself a conversion, and the assignees need not adduce evidence of a demand and refusal. Upon the question, under the stat. 46 Geo. 3, c. 135, (repealed from the 1st Sept. 1825, by the stat. 6 Geo. 4, c. 16), whether a party dealing with a trader knew him to be insolvent; the Jury may infer such knowledge from the fact of the party buying goods of the trader to a great extent for a period of near two years, at prices more than thirty per cent. under prime cost.

(a) As this commission issued in the year 1824, and before the stat. 6 Geo. 4, c. 16, which came into operation on Sept. 1, 1825, the question in this case was on the stat. 46 Geo. 3, c. 135, (repealed by the stat. 6 Geo. 4, c. 16,) which protected all payments and transactions with any bankrupt, *bona fide* made or entered into more than two calendar months before the issuing of the commis-

sion, unless the party had notice of an act of bankruptcy committed by the bankrupt, or that he was insolvent, or had stopped payment. The stat. 6 Geo. 4, c. 16, s. 81, considerably alters the law as it stood under the stat. 46 Geo. 3, c. 135. For that sect. see *ante*, p. 87, and the case of *Tucker*, assignee of *Hickman v. Barrow*, *ante*, p. 85.

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It appeared that Marshall was an extensive dealer in woollen cloths, and that in almost every week during the year 1823, and also in the year 1824, up to the time of his bankruptcy, he bought cloths of the manufacturers, and sold them, as soon as he received them, to the defendant, at prices much under prime cost, and under the market prices at that time. It was proved, that on one occasion, in the year 1823, Marshall bought certain pieces of cloth of the manufacturer at 671*l.* 13*s.*; and immediately afterwards sold them to the defendant for 382*l.* 11*s.*; and that, throughout their dealings in the year 1824, the sales of cloths to the defendant were at prices which were on an average 34*l.* 12*s.* 7*d.* *per cent.* lower than Marshall was to pay the manufacturers for them; and that those prices were very little more than fair prices for the mere wool in an unwrought state; but it was also proved, that the defendant paid for them in cash.

For the purpose of shewing the different dealings between Marshall and the defendant, the latter was examined before the Commissioners of Bankrupt; on his examination he did not bring his books with him, but while under examination he consented that the accountant to the commission, and one of the clerks of the solicitor, should go and examine his books, and compare those parts of them which related to these transactions, with an extract of the bankrupt's books, which they took with them. They did so, and the plaintiff's counsel wished to call the accountant to prove, from this inspection of his books, what the dealings between Marshall and the defendant had been, (the latter having had notice to produce his books).

Gurney, for the defendant, objected that the plaintiff's counsel ought not to be allowed to do this, without also reading the defendant's examination before the Commissioners of Bankrupt, because the books were examined at the defendant's counting-house, merely to save the trouble of producing them before the Commissioners.

Lord TENTERDEN, C. J.—I think I must consider it as all one transaction, and that if this account is made use of by the plaintiffs, the examination before the Commissioners must also be read.

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The defendant's examination was read: it stated that the bankrupt had told him that he was selling the cloths at a profit, and that he was worth between 3000*l.* and 4000*l.*; and it also stated that the defendant believed Marshall to be a solvent man.

There was no evidence given of any demand of the cloths being made on the part of the plaintiffs, or of any refusal of the defendant to deliver them up.

Gurney, for the defendant, objected that there was no conversion, as no evidence had been given of any demand or refusal.

Lord TENTERDEN, C. J.—It has been decided, I think, that the buying goods of a party who was not authorized to dispose of them is enough (a).

Gurney, for the defendant, addressed the Jury, and contended that the mere fact of a party selling his goods at low prices, could not be at all considered as conveying a knowledge that the seller of them was insolvent, for in the course of trade it often happened that a merchant of great opulence, having bought an article at a given price, and finding the market going against him, would sell at a loss, not only because he might fear that his loss would be greater if he waited, but also to get his capital again into a disposable state, so as to invest it in something else,

(a) In the case of *Hurst v. Gwynne*, 2 Stark. 306, Lord *Ellenborough* said, that the very act of taking goods from one who had no right to dispose of them, was

in itself a conversion; and the Court of K. B. afterwards concurred in that opinion: see also the case of *Soames v. Watts*, ante, Vol. 1, p. 400.

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which might be more productive; and he relied on the fact of the defendant's paying ready money, which he would not have done, if he had not been satisfied in his own mind that all was right; and he complained, that the effect of a verdict for the plaintiffs, would be to make the defendant pay for these goods twice over.

Lord TENTERDEN, C. J.—(In summing up to the Jury). The question in this case is, whether the defendant must not, as a man of business, have known, from the nature of these dealings with the bankrupt, Marshall, that the latter was an insolvent man. We find Marshall selling for a period of nearly two years, at prices vastly below prime cost; and it is for you, as men of business, to say, whether the defendant could go on dealing with a man in this way for so long a time, without knowing that he was insolvent. There is no doubt, that, for the sake of getting ready money, great sacrifices are often made in one or two transactions by solvent men, but the strength of this case on the part of the plaintiffs is, that there were not merely one or two dealings between these parties, but a continued series of them, both in the year 1823, and in the year 1824. If you think that the defendant at any time during those years, knew that Marshall was insolvent, from that time the dealings between them were all void. The plaintiffs now claim to recover the full value of the goods, and the defendant complains of hardship in having to pay for these goods twice over; but upon that I can only say, that those who deal with insolvent men, must be content to run that risk, and have only to thank themselves if such speculations do not always answer. However, as this is an action of trover, the damages are in your discretion, and you may find a verdict for such amount as you may think reasonable and proper, under the whole of the circumstances of this case.

Verdict for the plaintiffs.—Damages 3999*l.* 7*s.*

Scarlett, A. G., Campbell, and R. V. Richards, for the plaintiffs.

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Gurney, and F. Pollock, for the defendant.

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[Attornies—*C. Knight, and Sweet & Co.*]

FAIRLIE v. DENTON and Another, Gents. Two, &c.

Jan. 16th.

MONEY had and received. Plea—General issue.

The plaintiff had sent a letter to the defendants, demanding a sum of money as due to him. But no answer had been returned by the defendants.

The plaintiff's counsel called for the letter under a notice to produce, with a view of reading it in evidence, as a part of their case.

Scarlett, A. G., for the defendants, objected, that an unanswered letter, written by the plaintiff, was not evidence in his own favour; for otherwise a party would only have to write a letter to make evidence for himself.

F. Pollock, contra.—Certain things are stated in this letter, which the defendants might deny by answering it; and I submit that it is evidence, exactly the same as what is said verbally in the presence of a defendant is evidence against him, though he may make no answer.

LORD TENTERDEN, C. J.—I am slow to admit that. What is said to a man before his face, he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering a letter is quite different; and it is too much to say, that a man, by omitting to answer a letter at all events, admits the truth of the statements that letter contains. I am of opinion that this letter cannot be read. You may have that single line read, in which the

The plaintiff wrote a letter to the defendant, which the defendant did not answer. At the trial, the plaintiff's counsel called for it under a notice to produce, and wished to give evidence of its contents:—Held, that such evidence was not admissible; but that if, by the letter, the plaintiff demanded a certain sum, so much only of the copy of it might be read as stated the sum demanded. If the defendant's counsel take an objection, and the plaintiff's counsel answer it, and, in replying on the objection the defendant's counsel cite a case, the plaintiff's counsel will be allowed to observe on the case so cited.

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plaintiff makes a demand of a certain amount, but not any other part, which states any supposed fact or facts (a).

(a) It has been a question, on trials for high treason, how far papers found in the house of the party accused, are admissible in evidence against him; and the following extract from the trial of Mr. Horne Tooke, 25 State Tr. 120, respecting the admissibility of a letter, from a person named Cooper, which was found in his house, may be acceptable.

"Mr. Tooke.—I do not know what papers may have been taken from my house; but are letters written to me to be produced as evidence against me?

Lord Chief Justice Eyre.—Being found in your possession, they undoubtedly are producible as evidence; but as to the effect of them, very much will depend upon the circumstances of the contents of those letters, and *whether answers to them can be traced, or whether any thing has been done upon them*. A great number of papers may be found in a man's possession, which will be *primâ facie* evidence against him, but will be open to a variety of explanations; and it is always a very considerable explanation, that nothing appears to have been done in consequence of the paper being sent to him; but all papers found in the possession of a man are *primâ facie* evidence against him, if the contents of them have application to the subject under consideration.

Mr. Tooke.—The reason of my asking it is, I am very much afraid, that, besides treason, I may be charged with blasphemy.

Lord Chief Justice Eyre.—You are not tried for that.

Mr. Tooke.—It is notorious, that I do not answer common letters of civility; but I have received and kept many curious letters. I received some letters from a man whose name is *Oliver Verall*, and he endeavoured to prove to me that he was God, the Father, Son, and Holy Ghost. I kept the letters out of curiosity, and it is probable they may be produced against me. He proved it from the Old Testament, in the first place, that he was God the Father; because God is *O Verall*, that is, God over all. He proved he was God the Son from the New Testament, "Verily, verily, I am he," that is, *Veral I, Veral I*, I am he. Now, if these letters, written to me, which I from curiosity have preserved, but upon which I have taken no step, and to which I have given no answer, are produced against me, I do not know what may become of me.

Lord Chief Justice Eyre.—If you can treat all the letters that have been found upon you, with as much success as you have these letters of your correspondent, you will have no great reason for apprehension, even should that letter be brought against you."

The letter of Mr. Cooper was read.

In *Watson's Case*, 2 Stark. 140, it was held, that papers found in the lodgings of a co-conspirator, at a period subsequent to the apprehension of the prisoner, may

That line only of the letter, which contained a demand of the sum in question, was read.

In the course of the case, *Scarlett*, A. G., took an objection, which was answered by the counsel on the other side; but, in replying on the objection, *Scarlett* cited a case.

F. Pollock wished to observe on the case cited; but it was contended by

Scarlett, A. G., that he had no right to speak on the objection, after the counsel making it had replied.

LORD TENTERDEN, C. J.—As a case has been cited in replying on the objection, I think that Mr. *Pollock* has a right to observe on that case (a).

Verdict for the plaintiff.

F. Pollock, and *R. V. Richards*, for the plaintiff.

Scarlett, A. G., and *Comyn*, for the defendants.

[Attornies—*J. & S. Pearce & Co.*, and In person.]

IN the ensuing Term, *Scarlett*, A. G., obtained a rule nisi for a new trial, on the ground that the verdict was against evidence.

be read in evidence, although no *absolute proof* be given of their previous existence, where strong presumption exists, that the lodgings had not been entered by any one in the interval between the apprehension and the finding, and where the papers are intimately connected with the objects of the conspiracy, as detailed in evidence.

(a) If, on the trial of a case, the defendant's counsel calls no witnesses, but, in his address to the Jury cites cases, the practice is for the plaintiff's counsel to observe on the effect of those cases, confining himself to the law, without touching on the facts. As to the right to reply upon the facts and evidence, see *ante*, p. 75.

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Jan. 18th.

If in an action on a bond given by the sureties of a collector of taxes, there be breaches assigned, that the collector did not pay over money received, and that he did not duly demand and enforce payment of the taxes, it is not necessary, on the part of the plaintiff, to prove exactly what money he received; for if it be proved that he was to collect a certain sum, and that he paid over a smaller sum, and did not take proper steps to exonerate himself from the residue, the plaintiff will be entitled to recover. Omitting a word where the context supplies it, or inserting a wrong word, where the context corrects the mistake, is no variance. Therefore, if on oyer of a bond, the obligees are described as Commissioners acting under an act of Parliament for the regulation of the duties on assessed taxes, and in the bond the duties are stated to be duties of assessed taxes, this is no variance.

LOVELAND, surviving Obligee, v. KNIGHT.

DEBT on a bond for 7000*l.*, dated July 4th, 1824. The defendant craved oyer of the bond, of which the condition was, that one Richard Winkles, junr. who had been appointed a collector of assessed taxes for the parish of St. Mary, Islington, should well and truly pay, in pursuance of the acts of Parliament in such case made and provided, all sums of money assessed on and to be collected in the said parish; and that he should duly demand the sums assessed from the respective persons by whom the same were payable; and in case of non-payment, should duly enforce the powers of the said acts of Parliament against such as should make default. Pleas, *first*,—*Non est factum*. *Second*—Performance of the condition. *Third*—That Winkles was removed and discharged from his office of collector, on the 15th day of November, 1824; and that he performed the condition of the bond up to that time. *Fourth*—A nearly similar plea, stating also the appointment of a new collector in the place of Winkles. *Fifth*—Fraud.

Replication to the second, third, and fourth, pleas—That Winkles did not perform the condition, but that, on the contrary thereof, while he was collector, divers sums were assessed to be collected in the parish, and were collected and received by Winkles, yet that neither he nor his sureties well and truly paid the sums by him so collected, in pursuance of the directions of the statutes in the condition referred to. And further breaches were assigned, that, although many persons in the parish were duly assessed, yet Winkles *did not demand* the sums assessed, or any of them; and also that, although divers persons were duly assessed, and the taxes duly demanded, yet Winkles *did not enforce* the powers of the acts of Parliament. The replication also took issue on the plea of fraud. Rejoinder—Denying the breaches, and concluding to the country.

The bond was read. In setting it out in the record on oyer, it was stated as follows:—"Know all men, by these presents, that we, Richard Winkles, junr., of &c., and Samuel Knight, of &c., which said Richard Winkles, junr. is a collector for the parish of Islington, nominated, and appointed by the Commissioners acting for the division of Finsbury, in the county of Middlesex, in the execution of an act of Parliament, made and passed in the 43d year of the reign of his late Majesty king George the Third, intituled, 'An act for consolidating certain of the provisions contained in any act or acts relating to the duties under the management of the Commissioners for the affairs of taxes, and for the amending the same.' And also a certain other act of Parliament, made and passed in the 48th year of his said late Majesty's reign, intituled, 'An act to amend the acts relating to the *Duties on Assessed Taxes*, and of the tax upon the profits of property, professions, trades, and offices, and to regulate the assessment and collection of the same, so far as relates to the assessed taxes.' And also of a certain other act, &c. [setting out the titles of several more statutes], which said Samuel Knight, &c., are jointly and severally held and firmly bound, &c."

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v.
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When the bond was read, it appeared, that, in the bond itself, instead of the words "*duties on assessed taxes*," the words were, "*duties of assessed taxes*."

F. Pollock and *Parke* contended, that, as the bond was set out on oyer, the party was obliged to set it out in the very words.

Scarlett, *A. G.*, *Holt*, and *Bayly*, *contra*, argued, that if it were material to set out the title of this act, it must no doubt be done correctly; but that here, the change of the word *on* for the word *of* did not alter the sense; and as it could not mislead any one, it was no variance.

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LORD TENTERDEN, C. J.—A deed set out on oyer is to be considered the same as if it were made part of the declaration; but in the present case it strikes me, that the words set out, and those found in the bond, amount to the same in substance; but I will give leave to move to enter a nonsuit.

The duplicate assessment of the parish of St. Mary, Islington, was put in; and, under it, Mr. Winkles was to have collected 602*l.* 7*s.* 5*d.*, but it was proved by the Receiver-General of taxes, for the county of Middlesex, that Mr. Winkles only paid over to him a sum of 226*l.* 1*s.* 8*d.* This witness also proved, that it was the duty of a collector of taxes to make a return of all distresses that he had made for taxes in arrear, and also a return on oath of all persons bankrupt or insolvent, who were defaulters, and of whom he could not get the amounts of taxes assessed on them (*a*), but that Mr. Winkles had made no such returns.

The plaintiff's counsel contended, on this evidence, that, as breaches were assigned for not demanding, and for not enforcing payment of the taxes, as well as for not paying over the money actually received to the Receiver-General of taxes (*b*), it was not necessary to call every inhabitant who had paid taxes to Mr. Winkles, to shew how much money he had received, and not paid over to the Receiver-General; for that it stood thus:—if Winkles had received the money, and kept it, the plaintiffs could recover on the first breach; and if he had not received it, and had not made such returns to the Receiver-General as would exonerate himself, he was liable on the other breaches; and they relied on the 12th and 43d sections of the statute 43 Geo. 3, c. 99; and on the 23d section of the stat. 43 Geo. 3, c. 161 (*c*).

(*a*) Under the stat. 43 Geo. 3, c. 99, ss. 44, 45.

(*b*) Under the 48th section of the stat. 43 Geo. 3, c. 99.

(*c*) We have not thought it ne-

cessary to set out any of the sections of these statutes, as they will be found in 5 Burn's Justice, tit. Taxes, p. 319, *et seq.*

F. Pollock, for the defendant, submitted, that some allowance ought to be made for the taxes on empty houses, and for the taxes of those persons who would not have been able to pay, if the collector had used every diligence.

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Lord TENTERDEN, C. J.—The law is against you. The breaches are for not paying over, and also for not demanding and enforcing payment. Now, it appears that no return is made of any list of defaulters, which should have been done to discharge the collector; and by not returning such a list, persons are enabled to run away, who would otherwise have been obliged to pay their taxes; and therefore Mr. Winkles is liable for those taxes.

Verdict for the plaintiff for the whole amount of the taxes, deducting the sum paid over by Winkles, the sum received by the succeeding collector, and 800*l.* obtained on an extent against the goods of Winkles.

Scarlett, A. G., Holt, and Bayly, for the plaintiff.

F. Pollock and *Parke*, for the defendant.

[Attornies—*Smith & Buckerfield*, and *H. Hughes*.]

BEFORE LORD TENTERDEN, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.—In Bank.

F. Pollock now moved, in pursuance of the leave given at the trial, and contended that the word *on* being substituted for the word *of* in setting out the title of the statute 48 Geo. 3, which was stated in the bond, was a fatal variance; and that if a deed be set out on oyer, the party is bound to set it out in the very words; and that the deed set out being the same *in substance*, would not be enough; and he relied on the judgment of *Gibbs, C. J.*, in

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the case of *Waugh v. Bussell*, (a) where his Lordship said, "After oyer, and *non est factum* pleaded, the question is, whether the tenor set out is the same as the tenor of the bond executed; and I do not apprehend that it would suffice that it should agree in substance. In a declaration, it is only necessary to state the legal effect of the instrument; but on oyer, the plaintiff professes to produce a copy of it, as of the deed by which he asserts that the defendant is bound; and if it is not the true copy, the defendant may say, that is not the deed he executed."

BAYLEY, J.—Is not the Court bound to take notice, that there is an act of Parliament of that year, relating to the duties of assessed taxes?

LORD TENTERDEN, C. J.—The sense is not altered.

F. Pollock.—I submit, that whether the sense is altered or not, it is equally a variance on oyer.

BAYLEY, J.—Omitting a word where the context supplies it, is no variance. Inserting a wrong word where the context corrects the mistake, is also no variance.

F. Pollock.—In the case of *King v. Marsack* (b), in a declaration which recited an act of Parliament relating to Sheriffs, the words goods *and* chattels, were put for goods *or* chattels, and that was held to be a variance; and in the case of *Boyce v. Whitaker* (c), Lord Mansfield said, that as the defendant had unnecessarily set out an act of Parliament, he should be held to half a letter; and in the case of *Rann v. Green* (d), where the plaintiff declared on a private act of Parliament, as an act passed in the fourth year of the reign of Philip and Mary, and it was really passed in the fourth and fifth year, this was held to be a variance.

(a) 5 Taunt. 709. (b) 6 T. R. 771. (c) Cited Id. 774. (d) 2 Cowp. 474.

LORD TENTERDEN, C. J.—In setting out a deed on oyer, you must not depart in any way from the sense. I think in this case that the sense is the same. The case in *Taunton* is very different from the present; there the variance was, by putting “one” for “one hundred,” and no one could say that that did not alter the sense.

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BAYLEY, J.—If, on looking at the whole instrument, we see that there is a mistake, and the context shews what it should be, we are bound to read it correctly. In one case the word “is” had been evidently inserted by mistake, and the Court held, that they could reject it; so, if an instrument had a blank left in it, and in declaring on such instrument, the plaintiff had filled up that blank with the word that must have been intended, that would be no variance. Here the word “on” is used instead of the word “of” in setting out the title to an act of Parliament. We are bound to know what is the right word, and we must read it correctly.

HOLROYD and LITLEDALE, Js., concurred.

Rule refused.

GENERAL RULE.

Jan. 28th.

LORD TENTERDEN, C. J., said, that the Court wished it to be understood, that for the future, in *Hilary* and *Trinity* Terms, the Court would not hear any motion for a new trial, unless such motion were *actually made* within the first four days of the Term; and that even if counsel were instructed within the first four days, and there should not be time to hear them on the fourth day, the Court would not hear them afterwards; and in such cases the parties could only blame themselves for not instructing their counsel sufficiently early (a).

(a) The practice has been for day of each Term, to insert in a list the names of those cases in

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which they are instructed to move; *Michaelmas* Terms, in which, on account of the Circuits, the number of motions is large, the Court will continue to allow that course to be pursued.

COURT OF KING'S BENCH,
Sitting at Westminster, in Hilary Term, 1828.
 BEFORE LORD TENTERDEN, C. J.

Feb. 4th.

The Courts have so often decided that interest is not recoverable in an action for money had and received, that the Judge at *Nisi Prius* will not allow the point to be entered into.

DEPCKE v. MUNN, and Another.

ASSUMPSIT for money had and received. The defendants were auctioneers, who, in the year 1825, sold property belonging to the plaintiff, and received deposits from the purchasers, which they refused to pay over to the plaintiff, and for these deposits the present action was brought.

In the progress of the cause, every thing was admitted except the right of the plaintiff to recover interest, and against this Sir *J. Scarlett* was proceeding to contend, when he was interrupted by

Lord TENTERDEN, C. J., who said, the Courts have held again and again that interest cannot be recovered in an action for money had and received. The plaintiff may bring his action at once, but if he suffer his money to remain in the hands of the defendant, he is not entitled to recover interest upon it. This has been decided so often, that I cannot now venture to allow the question to be agitated.

Verdict for the plaintiff, for the principal sum only.

Rotch, and *Patteson*, for the plaintiff.

Sir *J. Scarlett*, and *Chitty*, for the defendants.

[Attornies—*R. & M. Browne*, and *Wilson & Co.*]

1827.

COURT OF COMMON PLEAS.

*Adjourned Sittings at Guildhall, after Trinity
Term, 1827.*

BEFORE MR. JUSTICE GASELEE,
(*Who sat for the Lord Chief Justice.*)

EDMONDS v. PEARSON.

July 16th.

A WITNESS was called on the part of the plaintiff, who objected to being sworn, on the ground that he came from the country, and had not been paid a sufficient sum for his expences. It appeared that he was subpoenaed in the country *on the part of the defendant*, and received the sum of 10*l.*; and it was after his arrival in London that he was subpoenaed on the part of the plaintiff.

A witness from the country, subpoenaed there by the defendant, without receiving sufficient for his expences, and afterwards, when in London, subpoenaed by the plaintiff, and called by him on the trial, is bound to give his evidence both in chief and on cross-examination, and must seek to obtain his expences in some other way than by objecting to be examined.

GASELEE, J., said, that the witness must give his evidence, as the plaintiff who subpoenaed him *in London* was not bound to pay him anything for expences.

The witness was accordingly sworn, and, when he had finished his evidence in chief, objected to be cross-examined, as that would be giving evidence for the defendant, who had neglected to pay what was due to him.

GASELEE, J., ruled, that having been examined in chief, he was bound to continue his evidence, and must seek his expences in some other way.

Wilde, Serjt., and *Hutchinson*, for the plaintiff.

Bosanquet, and *Taddy*, Serjts., for the defendant.

[Attornies—*Reeves*, and *J. & H. Lowe*.]

1827.

July 21st.

If proper clothes are supplied to an infant by his father, any others furnished in addition cannot be considered as necessities; and it is the duty of a tradesman when applied to by an infant for clothes to make inquiries of his friends, before he gives him credit.

COOK v. DEATON.

ASSUMPSIT, on a tailor's bill. Plea—Infancy. Replication—That the goods furnished were necessities.

The defendant was apprenticed to a person who was in partnership with his step-father in the trade of a glover, and lived in the house with them. The clothes in question were delivered at the house; and on one occasion the defendant had some of them on, when he was walking in company with his mother. Part of the clothes were to be used for private theatricals. The defendant's step-father provided clothes for him suitable to his station; and happening once to be present when the plaintiff's servant brought a variety of articles, he directed him to take them back to his master, and at his peril to bring any more.

Wilde, Serjt., submitted, that the plaintiff was not entitled to recover any thing.

Taddy, Serjt., contended, that at least he was entitled to recover for the clothes which were worn in the presence of the mother. The question is, whether the father had not reason to know that there were other clothes furnished; and, as they were not returned, we are entitled to be paid for them.

The father being asked, stated that he had not any idea of the supply.

BEST, C. J., (in summing up).—The plaintiff *ought to have made inquiries of the father*. The father says he knew nothing about the plaintiff's supplying his son with clothes. As there were proper clothes provided by the father, those furnished by the plaintiff cannot be considered as necessities.

Verdict for the defendant.

Taddy, Serjt., and *Comyn*, for the plaintiff.

Wilde, Serjt., and *Ryland*, for the defendant.

[Attornies—*Glynnes* and *Pickering*.]

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See *Blackburn v. Mackey*, ante, Id. 5. *Turberville v. Whitehouse*, Vol. 1, p. 1. *Fluck v. Tollemache*, Id. 94.

LEACH v. MULLETT and Another.

Oct. 3d.

ASSUMPSIT to recover from the defendants, who were auctioneers, a sum of 30*l.*, which had been paid by the plaintiff as a deposit for the purchase of two houses in Elizabeth Place, under the following circumstances:—The property was sold by public auction, and in the particulars of sale the houses were described as Nos. 3 and 4, instead of Nos. 2 and 3, but the names of the occupiers were correctly stated. It was also stated in the particulars, that the taxes of No. 3 were paid by the tenant, whereas, in fact, they were farmed by the landlord. No. 4 belonged to a person who had not given the defendant any authority to sell it. One of the conditions of sale consisted of a provision, that, if any error or mis-statement should be found in the particulars, it should not vitiate the sale, but an allowance should be made on account of it. It appeared, that Nos. 2 and 4 were of the same description of houses, but that No. 4 was in rather the best state of repairs.

The particulars of sale at a public auction described two houses as Nos. 3 and 4, and stated, that the taxes of No. 3 were paid by the tenant. The houses ought to have been described as Nos. 2 and 3, but the names of the occupiers were correct; and it should have been stated that the taxes of No. 3 were farmed by the landlord. The houses, Nos. 2 and 4, were of the same rate: but No. 4 was in the best state of repair:—Held, that these misdescriptions were not cured by a condition, which provided, that if any error or mis-statement should be found in the particular, it should not vitiate the sale.

Spankie, Serjt., for the defendant, submitted, that, in consequence of this provision, the plaintiff was not entitled to recover. It is for the Jury to say, whether the mis-statements are false and deceitful misrepresentations, or merely errors.

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v.

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BEST, C. J.—Do you mean to say, that, if I undertake to sell you one house, by making you an allowance, I can compel you to take another?

Spankie, Serjt.—No, my Lord; but in this case the error cures itself. It is said, No. 4, occupied by Frost, who is, in fact, the tenant of No. 3. *Constat de corpore*. The mistake in the number is of no consequence. The name of the tenant is the substantial description of the house. There can be no doubt as to which were the houses meant. If the plaintiff had gone to inquire for them, he would have found them out by the names of the occupants. I submit that this is not such a mistake as will vitiate the contract. In the case of the Duke of *Norfolk v. Worthy* (a), Lord *Ellenborough* said, that he should always require an ample and *substantial* performance of the particulars of sale, and that a clause, providing that an error in description should not vitiate the sale, was, he conceived, meant to guard against *unintentional* errors; and his Lordship left it to the Jury to say, whether the mis-statement in that case was merely erroneous, or wilfully introduced to make the property appear more valuable. Now, I submit, that, in the present case, the error is quite unintentional, and not intended to deceive. Then, as to the other objection, with respect to the taxes, that is clearly a matter of arithmetical computation, and is therefore a subject of allowance and compensation.

BEST, C. J.—I quite agree with the law as laid down by my Lord *Ellenborough*. If it is merely an error or a mis-statement from error, then it is cured by the conditions. But there must be this limitation, if the description is of any other property than that intended to be sold, though it is made by error, the conditions do not cure it. If the plaintiff had intended to buy the house

(a) 1 Camp. 337.

sold, notwithstanding the misdescription, I should have thought that you would be justified in finding your verdict for the defendant; for I should not suffer the plaintiff to take advantage of a mistake by which he had not been prejudiced. But, as it stands, it seems to me, that you must take it, that the plaintiff intended to buy Nos. 3 and 4, because they, according to the evidence, were in the best state of repair. But that is not all: there are too many mistakes here. There is a mistake as to the payment of the taxes. If it was a pure mistake, not prejudicing the party, then it would be cured by the conditions; but I think that auctioneers ought to be narrowly watched, lest, under the idea of mistake, they may cover material matters. If you think, in this case, that it is all a mere error, capable of being compensated by pecuniary recompence, then you will find your verdict for the defendant.

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v.
MULLETT.

Verdict for the plaintiff.—Damages, 30*l*.

Andrews, Serjt., and *Hutchinson*, for the plaintiff.

Spankie, Serjt., for the defendants.

[Attornies—*H. Chester*, and *Clutton & C.*]

WILLIS and Another v. ELLIOTT, Senr.

Oct. 3*d*.

TROVER.—The plaintiffs were assignees, under the Insolvent Debtor's Acts, of Elliott, junr., the son of the defendant; and the question was, whether, under the circumstances of the case, the assignment made to them by the provisional assignee was valid. The insolvent presented his petition on the 27th of February, 1827, and executed the provisional assignment on the same day, pursuant to the statutes; and on the 26th of March, 1827, he

The assignment to the provisional assignee of the Insolvent Debtors' Court, is not made void by the death of the insolvent before his petition has been heard; and such provisional assignee may, after such death assign to the assignee for the

creditors; and they may bring actions in respect of the insolvent's property.

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died. The assignment from the provisional assignee to the plaintiffs was not made till the 3d of April, 1827. The insolvent's petition had not been heard by the Court previous to his death. The question turned on sect. 11 of the 7th Geo. 4, c. 57 (a).

(a) That section enacts, "that such prisoner shall, at the time of subscribing the said petition, duly execute a conveyance and assignment to the provisional assignee of the said Court, in such form as is to this act annexed, of all the estate, right, title, interest, and trust of such prisoner, in and to all the real and personal estate and effects of such prisoner, both within this realm and abroad, except the wearing apparel, bedding, and other such necessities of such person, and his or her family, and the working tools and implements of such prisoner, not exceeding, in the whole, the value of twenty pounds, and of all future estate, right, title, interest, and trust of such prisoner, in or to any real and personal estate and effects within this realm or abroad, which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him or her, before he or she shall become entitled to his or her final discharge, in pursuance of this act, according to the adjudication made in that behalf; or in case such prisoner shall obtain his or her discharge from custody, without adjudication being made in the matter of his or her petition, then, before such prisoner shall be at large and out of custody; and of all debts due or growing due to such prisoner, or to be due to him or her be-

fore such discharge as aforesaid; which conveyance and assignment, so executed as aforesaid, in form aforesaid, shall vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee; and the same shall be made subject to a proviso, that in case the petition of any such prisoner shall be dismissed by the said Court, such conveyance and assignment shall, from and after such dismissal, be null and void to all intents and purposes; and the said Court is hereby empowered to dismiss any such petition in the matter whereof a final adjudication shall not have been made in pursuance of this act, at any time when it shall seem fit to the said Court to dismiss the same: provided always, that where in any case, by leave of the said Court, any amendment shall be made in any such petition, or an amended petition shall be filed as of the date of the original petition, which the said Court is hereby empowered to do and authorize, without dismissing such original petition, the assignment and conveyance executed in such case shall not thereby be affected, but shall stand good to all intents and purposes, notwithstanding such

Wilde, Serjt., for the plaintiffs, contended, that the assignment was valid, and continued in force, notwithstanding the death of the insolvent, as the statute would not take away what had been once vested.

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Taddy, Serjt.—The discharge of the insolvent from his debts, so far as his person is concerned, is the only consideration for the assignment; and if he dies before that discharge takes place, the whole thing fails. This construction appears to be the regular one by analogy to the statutes concerning bankrupts. The stat. 1 Jac. 1, c. 15, s. 17, enacted, that if a bankrupt died before distribution, the Commissioners might nevertheless proceed in execution concerning his goods, &c. in such sort, as they might have done if he had been living. By the statutes relating to insolvents, passed previously to the 1 Geo. 4 (a), the insolvent was not to execute the assignment till the order was made for his discharge. The adjudication of discharge is the foundation of the proceedings; and as that could not take place here, the whole of the proceedings must fall. Then, again, the 57th section seems to contemplate the event of death, and to give a different remedy to that which is here contended for, *viz.* by enabling a judgment to be entered up against the party. Now this could not be against him as an insolvent, because a judgment is against the person, and the person of the insolvent is protected. That section provides, that, before any adjudication, the prisoner shall execute a warrant of attorney to confess judgment for the amount of the debt contained in the schedule; and the Court may permit execution to be taken out thereupon, when the insolvent is of ability to pay, or is dead, leaving assets.

amendment or amended petition so filed as aforesaid."

The "Form of Conveyance and Assignment," alluded to in the

above section, is given in a Schedule to the act.

(a) 53 Geo. 3, c. 102; 54 Geo. 3, c. 28; 56 Geo. 3, c. 102.

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BEST, C. J.—Assume, for a moment, that this is an assignment without consideration, yet, unless my brother *Taddy* proves that his client purchased for a valuable consideration, it is good as against him. But I take the law to be this, upon the words of this statute, and in comparison with the other statutes, that the assignment takes effect absolutely on the presentation of the petition, except in the case particularly mentioned and excepted. It seems that the Legislature found that they had done wrong in allowing the assignment to be made at the time of the *discharge*. No doubt they found that a great deal of property was conveyed away after the insolvent came into prison. The late statutes, therefore, alter the law in that respect; and it appears to me, that the assignment operates in every event but one, and that is specially stated in the proviso itself, on the principle—“*Expressio unius est exclusio alterius*.”—The words are, “which conveyance and assignment, so executed as aforesaid, in form aforesaid, *shall vest* all the real and personal estate and effects of such prisoner,” &c. “in the said provisional assignee, and the same shall be made subject to a proviso, that, *in case the petition* of any such prisoner shall *be dismissed* by the said Court, such conveyance and assignment shall, from and after such dismissal, be null and void to all intents and purposes.”

With respect to section 57, it appears to me, that that section has nothing to do with the property the insolvent had at the time of his discharge. The object of that section is to make him do justice afterwards, and to get hold of property subsequently acquired, which property can only be obtained if he lives to get discharged. I do not think that the statute of Jac. 1 has any direct relation to this point, as that was made in the imperfect state of the law. I am decidedly of opinion, that this proviso must be construed most liberally towards the creditor, otherwise these acts of Parliament for the discharge of insolvent debtors would be much more injurious than beneficial to the public.

The amount of damages was afterwards referred.

Wilde, Serjt., and *Kelly*, for the plaintiffs.

Taddy, Serjt., for the defendant.

[Attornies—*Galworthy*, and *Kinder*.]

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vs

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IN the ensuing Michaelmas Term, *Taddy*, Serjt., moved for a nonsuit, but the Court refused a rule.

See 1 Moore & Payne's Rep. p. 19.

PHILLIPS v. HARTLEY.

Oct. 3rd.

USE and occupation, on the following agreement:

"Memorandum of an agreement for a lease, made &c. between, &c.; viz. A. Phillips agrees to grant, and A. Hartley agrees to take, a lease of &c. for &c. at the yearly rent, &c. &c. &c."

No lease had been prepared; but the defendant had occupied during the term under the paper in question. It was stamped with an agreement stamp.

Wilde, Serjt., for the defendant, submitted, that this was itself a lease, and required a lease stamp. The words are immaterial; the question is, whether it is an instrument merely preparatory to another, or is itself to regulate the holding; many things are to be done under it before the commencement of the term. Nothing is said about the time when a lease is to be prepared, or by whom, or what covenants it is to have; but here are all the particulars of the tenancy in this specific paper; and in point of fact, the premises have been enjoyed under it during the whole of the term.

A document by which A. agrees to grant, and B. to take, a lease of certain premises for a certain term, at a certain yearly rent, is to be considered merely as an agreement, not requiring a lease stamp, although no lease be prepared, and B. occupies during the whole of the term under such document, and pays the rent specified in it.

An administrator cum *testamento annexo*, cannot declare before administration is granted.

V. Lawes, Serjt.—The instrument is merely executory,

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whether we look at the words or the intention of the parties. It is "memorandum of agreement *for* a lease," not "agreement *of* a lease;" then "A.H. *agrees to take*," not "*takes*" a lease, &c. If there is nothing uncertain in the language of the instrument, it must have its fair construction, and be taken as an agreement only.

BEST, C. J.—I think it is only an agreement for a lease, no present interest passes.

Wilde, Serjt.—It is not necessary that the interest should be present, the question is, whether an interest is to pass. A lease may commence *in futuro*, and if at Midsummer an interest passed, that will be sufficient. It is clear the parties took some interest under this paper.

BEST, C. J.—I think it does not confer any present interest; I think the lessor might have turned the defendant out the next day, and all he could have got would have been by a suit in a Court of Equity.

The agreement was received in evidence, and the case went on; the plaintiff was administrator with the will annexed. The date of the administration was the 12th February, 1827. The declaration was of Hilary Term, 1827, which commenced on the 23rd of January, and ended on the 12th of February.

Wilde, Serjt., submitted, that the plaintiff must be nonsuited. The declaration, being intitled of the Term generally, has relation to the first day, viz. the 23rd of January; and the administration was not granted till the month of February. An administrator cannot declare before administration granted. His title commences with such grant, and is not like that of an executor, which relates back to the date of the will.

V. Lawes, Serjt.—I submit that an administrator *cum testamento annexo* stands in the situation of the executor who has renounced.

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Wilde, Serjt.—His authority comes from the law in the same way as that of any other administrator.

BEST, C. J.—I think it is so (a).

The case was afterwards referred.

V. Lawes, Serjt., and *Chitty*, for the plaintiff.

Wilde, Serjt. for the defendant.

[Attornies—*Collier & Co.*, and *Hardwick*.]

(a) In *Wankford v. Wankford*, *Powys, J.*, said, "That an executor is a complete executor as to every intent but bringing of actions, before probate, so that he may release a debt due to the tes-

tator," &c., "but an administrator cannot act before letters of administration granted to him." 1 Salk. 301.

See also the next case of *Thompson v. Reynolds* and Another.

THOMPSON v. REYNOLDS and Another.

Oct. 4th.

REPLEVIN.—The declaration commenced as follows: James Reynolds, and Henry Holland Duffill, the defendants in this suit, were summoned to answer Joshua Thompson, the plaintiff in this suit, and *executor of the last will and testament of John Fisher, deceased*, of a plea—Wherefore &c. &c. Profert was made in the usual manner, viz.—And the said plaintiff brings into Court here the *letters testamentary* of the said John Fisher deceased, *whereby it appears to the Court here, that the said plaintiff is executor*

A plaintiff sued as executor, and in his declaration made profert of the letters testamentary in the usual form, which states "whereby it appears to the Court here that the plaintiff is executor," &c. The defendant did not demand oyer, but pleaded that

the plaintiff never was nor is executor "in manner and form" as alleged in the declaration. The plaintiff replied that he was, and continued to be executor in manner and form, &c. Held, that the plaintiff might recover on this issue, although he had not taken probate till some months after the declaration.

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of the last will and testament of the said John Fisher, and hath execution thereof, &c.

There were several avowries, and a plea in the following form, viz.: "that the plaintiff, suing as executor as aforesaid, ought not to have or maintain his aforesaid action against the defendants, because they say that the plaintiff *never was nor is the executor* of the last will and testament of the said John Fisher deceased, *in manner and form as the said plaintiff hath above, in his said declaration, in that behalf alleged.*"

To this plea the plaintiff replied, that he "by reason of any thing by the defendants in that plea alleged, ought not to be barred from having and maintaining his aforesaid action against them, because he saith, that he *at the time of the commencement of this suit was, and from thence hitherto hath been, and still is, executor* of the last will and testament of the said John Fisher deceased, *in manner and form* as he the said plaintiff hath above, in his said declaration, in that behalf alleged."

The declaration was of Hilary Term, and it appeared, that the plaintiff had not proved the will till the 6th of July following.

Wilde, Serjt., for the defendants, submitted that the plaintiff ought to be nonsuited. An executor cannot declare before probate. How is a defendant to know whether a plaintiff is clothed with the character of executor, unless he has taken out probate. A plaintiff must make profert; and the necessity of doing that shews, that the probate should be obtained before the time when profert is made. The will being a will of personalty, the only title of the executor is by the probate. The record of the Ecclesiastical Court is the only evidence of executorship.

BEST, C. J.—How is the objection to be taken advantage of?

Wilde, Serjt.—I apprehend the defendants can only deny that the plaintiff filled the character of executor.

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Spankie, Serjt., for the plaintiff.—They should have demanded oyer of the probate.

Chitty, contra.—It is true that the defendants may demand oyer, but they have no means of enforcing that demand. They can only search, to ascertain if probate has been granted; and in this case we have done that. The words of the issue are, that the plaintiff “never was, nor is, executor” of Fisher, “in manner and form” as in the declaration alleged. Now, what is the manner and form in which that allegation is made? It is this, viz. that it appears by the probate; whereas, at the time of the allegation, there was no probate in existence. The executor’s title is derived only from the probate. In the 3 T. R. it is said (a), that the mere production of the probate is an answer to a charge of having forged the will to which it relates. When a plaintiff declares, he must have a complete cause of action, which this plaintiff had not, and therefore he must be called.

Spankie, Serjt.—There is a fallacy in the arguments on the part of the defendants. My friends assume that the plaintiff, as executor, derives his title from the probate, whereas in fact it is from the will itself, from the appointment of the testator, that he has his authority. The pro-

(a) *Arguendo* in *Allen v. Dundas*, 3 T. R. 125, on the authority of *Rex v. Vincent*, 1 Strange, 481. However, on this point the case of *Rex v. Buttery*, Russell & Ryan, 342, determined in the year 1818, decided, that on an in-

dictment for forging a will, the probate unrepealed is not conclusive evidence of its validity, so as to bar the prosecution. This case expressly overrules that of *Rex v. Vincent*, above alluded to.

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bate is not produced as the executor's title, but merely as the evidence of it (a).

BEST, C. J. was of opinion, that the plaintiff would be entitled to a verdict on the special plea (b).

The case was then gone into, and the plaintiff had a verdict on the plea above-mentioned, and the defendants on the avowries.

(a) In the case of *Smith v. Mills*, 1 T. R. 480, it is said that, "an executor does not derive his title under the probate, but under the will; the probate is only evidence of his right, and is necessary to enable him to sue; but he may release before probate." And in the case of *Rex v. Netherseal*, 4 T. R. 258, Lord *Kenyon* says, "that nothing but the probate, or letters of administration, with the will annexed, is legal evidence of a will in all questions respecting personalty."

(b) As to the power of an executor before probate, in Comyn's Dig. tit. Administration, B. 9, it is said, that an executor may commence an action before probate, though he shall not declare; and reference is made to the case of *Wankford v. Wankford*, 1 Salk. 299; and upon looking into that case it appears that the distinction is made because "when he comes to declare, he must produce in Court the letters testamentary;" and it is added, "the reason why an executor cannot go on before probate is, for the enforcing of probates, as is said in Hutton

31, because, upon probate, there are inventories exhibited, and other acts done by the executor, which are for the benefit of the creditors of the testator."

In *Hensloe's* case, 9 Co. 38 a. it is said, "Les executors ont leur titre per le testament que est temporal, &c. quel testament est compleat quant a tous biens et chateaux in possession et reversion," &c. "Mes quant a suer des actions in les Courts le Roy les judges ne admittont les executors a suer per choses in actions sinon que ils monstrent le testament duement prove desouth seal del ordinary:"—The case of *Duncomb v. Walter*, 3 Lev. 57, decides, that, if an executor arrest a man before probate, and afterwards prove the will, it is good by relation between the parties; but not as against strangers. And in the report of the same case, in 1 Vent. 370, it is said, "Where an executor brings an action before probate, yet, if he shows the probate upon the declaration, it is well enough."

See also the case of *Smith v. Mills*, 1 T. R. 480, before cited in note (a).

Spankie, Serjt., and *Lee*, for the plaintiff.

Wilde, Serjt., and *Chitty*, for the defendants.

[Attornies—*Nicol*, and *Owen*.]

1827.

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r.
REYNOLDS.

*Adjourned Sittings in London, after Trinity
Term, 1827.*

BEFORE LORD CHIEF JUSTICE BEST.

MORRISON and Another *v.* LENNARD.

Oct. 9th.

COVENANT on an indenture of apprenticeship. The apprentice was called as a witness. He was both deaf and dumb. An interpreter was sworn, who put questions to the witness by signs made with his fingers, and was answered by the witness in the same mode. The interpreter said, that he spelt every word to the witness completely.

It appeared that the witness was able to write.

BEST, C. J., observed.—I have been doubting whether, as this lad can write, we ought not to make him write his answers. We are bound to adopt the best mode. I should certainly receive the present mode of interpreting, even in a capital case; but I think, when the witness can write, that is a more certain mode.

Though the mode of examining a deaf and dumb witness by means of signs made with the fingers, is a mode receivable even in capital cases, yet, where the witness can write, *seems* that it would be better to make him write his answers to the questions put to him.

Verdict for the plaintiffs.

Wilde, Serjt., and *Busby*, for the plaintiffs.

Andrews, Serjt., for the defendant.

[Attornies—*Haslam*, and *Vincent*.]

1827.

Oct. 9th.

RICHARDSON v. WEBSTER, Bart.

A mercer furnished ribands to a person who was a candidate for the representation of a city in Parliament; the ribands were partly used as presents for voters; the mercer was himself a voter, and received orders for some of the ribands, from the candidate himself, in his committee room, but was not told for what purpose they were wanted: Held, that he was entitled to recover the price of the ribands from the candidate, notwithstanding the provisions of the stat. 7 & 8 W. 3, c. 4.

ASSUMPSIT for goods sold and delivered.

The plaintiff was a mercer, residing at Chichester, in Sussex, and the demand was for the price of a quantity of ribands furnished by him for the use of the defendant at the time of the general election in the year 1825, the defendant being then a candidate to represent Chichester in Parliament.

One of the defendant's committee proved, that, after the election was proclaimed, he, by the desire of the defendant, ordered the ribands in question of the plaintiff, at his shop; and that afterwards, the plaintiff, who was himself a voter, attended at a meeting of the committee, at which the defendant himself gave him an order for ribands, but did not say for what purpose they were wanted. It appeared that in fact they were very generally distributed, being partly given to voters, partly to a set of persons called White Boys, (some of whom were also voters), and partly to ladies; on some occasions they were given to any person who asked for them; and a part of them was used for the decoration of the Golden Fleece, which was the sign of the inn at which the committee met.

Taddy, Serjt., for the defendant, contended, that, upon the words of the statute 7 & 8 W. 3, c. 4, the contract was illegal, and the plaintiff could not recover. The words of the statute are very general; viz. that no person or persons to be elected to serve in Parliament for any county, &c. after the teste of the writ, &c., or after any such place becomes vacant, shall by himself or themselves, or by any other ways or means on his or their behalf, or at his or their charge, before his or their election, directly or indirectly give, present, or allow to any person or persons having voice or vote in such election any money, meat, drink, entertainment, or provision, or make any present

gift, reward, or entertainment to or for any such person or persons, or to or for the use, advantage, benefit, employment, profit, or preferment of any such person or persons, in order to be elected, or for being elected to serve in Parliament," &c.

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RICHARDSON
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BEST, C. J.—As far as the ribands for the voters are concerned, that will be an answer to the action.

TADDY, Serjt.—Then the remainder cannot be distinguished: the contract itself is void; the order is a joint order, and cannot be good for part and bad for part. It is impossible to divide an illegal contract. If it was for ribands for the voters, the subsequent disposal of part of them in a different way will not alter it. This is clearly an illegal contract, if the plaintiff was at all aware of the purpose for which they were wanted. He cited *Ribbans v. Cricket* and *Another (a)*.

RUSSELL, Serjt., for the plaintiff.—That was not the case of any thing sent to *the candidate*, but the case of a contract by an innkeeper to supply *voters* with provisions.

BEST, C. J.—I do not think there is enough, upon this evidence, to shew that the plaintiff furnished the ribands expressly to be used for an illegal purpose.

TADDY, Serjt.—It is for the Jury to say, whether the plaintiff did not know that the ribands were to be used by voters. I submit that he must have known it, as he was himself a voter, and received orders for them in the defendant's committee room.

(a) 1 Bos. & P. 264. This case decides, that, it being contrary to 7 & 8 W. 3, c. 4, for a candidate to furnish provisions to any voters

after the teste of the writ, an innkeeper cannot recover against a candidate for provisions so furnished at his request.

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BEST, C. J., (to the Jury).—The question for you, is, whether the plaintiff knew that these ribands were ordered for the purpose of distribution among the voters; for if he did, he is not entitled to recover. If there were no *other* purpose to which ribands could be applied, that would be cogent evidence of their being supplied solely for *that* purpose. But there were several other purposes, as the decoration of the sign, &c. I cannot find, upon the evidence, that the plaintiff was ever told that these ribands were to be used for an illegal purpose. If you think that he did know it, then you will find your verdict for the defendant. But it seems to me, if you believe the evidence, that your verdict must be for the plaintiff.

Verdict for the plaintiff—Damages 21*l.* 5*s.*

Russell, Serjt., and *Kelly*, for the plaintiff.

Taddy, Serjt., for the defendant.

[Attornies—*Ellis & B.*, and *Capron & Co.*]

Oct. 10th. RAINS and Another, Assignees of EVELYN, a Bankrupt, v. STORRY.

A. applied to B. for goods; B. asked for a reference; A. referred him to C.; C., on being applied to, inquired the amount of the order, and on what terms the goods were to

be furnished; and on being told, said "You may send them, and I'll take care that they are paid for at the time." He was afterwards written to, to accept a bill for the amount; to which he replied, that he was not in the habit of accepting bills, but that *the money would be paid when due*. After this B. the seller wrote to C. about the goods, and spoke of them in his letter as goods which C. had "*guaranteed*;" and the attorney of B.'s assignees (when he had become bankrupt) wrote to A. for the money, and threatened process; but this letter was a circular, written in pursuance of a list made out for him by B., and without any knowledge of the circumstances under which the debt was contracted: Held, that on this evidence C. was not primarily liable, but only as a guarantor of the debt of A.

ASSUMPSIT for goods sold and delivered.

The bankrupt's traveller received an order for goods from a Mrs. Stoker, he told her the prices, but asked her for a reference; she referred to the defendant. The traveller went to the defendant, and told him that Mrs. S. had ordered goods, but that he would not send them without

his authority. The defendant inquired as to the amount of the order, and was told about 18*l*. He asked if it would exceed 20*l*., and was answered in the negative. He asked if that was sufficient to give her a "fairish start," and was told by the traveller that in his opinion it was. He then made inquiry as to the terms, and was told four months credit, or 2½ per cent. discount for cash. He then said, "*You may send them, and I'll take care the money shall be paid at the time.*" The traveller asked whether he might send any more, if Mrs. S. should want them. To which the defendant replied, "not without letting me know." A letter was soon afterwards written to the defendant, requesting him to accept a bill for the amount of the order; to which he returned for answer that he was not in the habit of accepting bills, but that the money would be paid when due.

E. Lawes, Serjt., for the defendant, submitted, that, on the evidence, there was no case for the Jury, as the order was given by Mrs. Stoker, and not by the defendant.

BEST, C. J.—The decisions on the subject run very fine; but there is the letter, and my doubt is, whether that letter does not apply itself to the by-gone contract, and make a good consideration.

E. Lawes, Serjt., referred to the case of *Mines v. Sculthorpe* (a).

BEST, C. J.—Then is not this a direct undertaking by the defendant?

(a) 2 Camp. 215. This case decides, that if a person, by a written guarantee, undertake to another to answer for the payment of goods to be sent to a third, the declaration by the seller against him must be special on the guarantee; and assumpsit for goods sold, will not be sufficient.

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E. Lawes, Serjt.,—I submit not. *Mrs. Stoker* gives the order, and upon that she becomes liable immediately; but the traveller says, very prudently, I will not execute the order immediately, nor until you can refer me to somebody else. The rule laid down in the case of *Matson v. Wharam* (a), is, that if the person, for whose use the goods are furnished, be liable at all, any promise by a third person to pay for them must be in writing.

BEST, C. J.—If you shew that any credit was given to *Mrs. Stoker*, you will bring your case within that of *Matson v. Wharam*. At present, I do not think you are within that case. If you will shew that a bill of parcels was sent to *Mrs. Stoker*, I will nonsuit the plaintiff.

For the defendant, several letters were then put in. The first was from the attorney for the plaintiff, addressed to *Mrs. Stoker*, requiring payment by a certain day, and threatening proceedings if the account was not then settled.

The second was from the bankrupt to the defendant, saying, amongst other things, “the goods you *guaranteed* to *Mrs. Stoker*, have been delivered,” &c.

The third was from the same to the same, stating: “I once more write respecting my account, which you *guaranteed* to me,” &c.

Wilde, Serjt., for the plaintiff.—The evidence is of an original credit to the defendant. Your Lordship will not hold that a tradesman is to lose his demand by speaking of a thing as a guarantee, when, in point of law it is not so. The question must be decided upon that which took place before the order was executed, and upon the fulfil-

(a) 2 T. R. 80. In this case it was decided, that although a tradesman be induced to send goods on credit to another by a promise made in these words:

“If you do not know him, you know me, and I will see you paid;” yet he cannot recover unless such promise were in writing.

ment of which that execution took place. This, I submit, is the proper test. I am to shew, that the defendant was to be liable at all events. The traveller said, that he had refused to trust Mrs. Stoker; on which the defendant said, that he might send the goods, and he would take care that the money should be paid. I have produced the defendant's letter, written soon after the order, in consequence of a bill having been drawn, not on Mrs. Stoker, (who it is now contended was liable), but on the defendant himself. And in this letter the defendant does not say, that he is only liable in default of payment by Mrs. Stoker; but that the money shall be paid when it becomes due. This, I submit, shews clearly that the bankrupt treated the defendant as the only person liable in the first instance.

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The attorney for the plaintiffs was then called, and stated that the letter which he wrote to Mrs. Stoker, was a circular letter; that he wrote a similar letter to all the persons who were mentioned in a list given to him by the bankrupt; and that at the time he wrote it, he knew nothing of the particular circumstances under which the debt was contracted.

After *E. Lawes*, Serjt., had observed upon this evidence,

Wilde, Serjt., was about to commence his reply, when

BEST, C. J., intimated, that he should call the plaintiff.

Wilde, Serjt.—Will your Lordship give me leave to move?

BEST, C. J.—If you think right to move, you may.

Nonsuit (a).

(a) No motion was ever made.

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Wilde, and *Andrews*, Serjts., and *Kelly*, for the plaintiffs.

E. Lawes, Serjt., for the defendant.

[Attornies—*Parker*, and *Hornby*.]

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HUBBARD v. JACKSON.

A bill, which has been paid by the drawer, in default of payment by the acceptor, may afterwards be re-issued by the drawer, and the acceptor will be still liable to pay it.

In such case, if an action be brought against the acceptor by the indorsee of the drawer, the acceptor cannot inquire into the state of the accounts between the indorsee and drawer, nor will the state of such accounts furnish him with any defence.

ASSUMPSIT on a bill of exchange, dated 25th December, 1820, at three months after date, drawn by one Melville on, and accepted by, the defendant, made payable to the drawer's order, and indorsed by him to the plaintiff. Before the bill became due, Melville indorsed it to a person named Wallace; but, as the defendant, Jackson, did not pay Wallace when it became due, Wallace sued Melville, who paid the debt and costs, and afterwards indorsed the bill to the plaintiff, Hubbard. Hubbard now sued the defendant as the acceptor.

Storks and *E. Lawes*, Serjts., for the defendant, contended, that he was discharged by the conduct of Melville, the drawer.

Wilde, Serjt., for the plaintiff, submitted, that he was still liable. If a drawer takes up a bill because it is not paid by the acceptor, the bill is not a satisfied bill, and may be re-issued.

The defendant's counsel were then proceeding to go into evidence of the state of the accounts between Hubbard the plaintiff, and Melville the drawer, to shew that Hubbard had no claim upon Melville, and, therefore, had no right to sue on this bill, which he received from him.

BEST, C. J.—I am clearly of opinion, that, as to the account between Melville and Hubbard, that is no answer to this action; Melville may have a right to bring an action against Hubbard, to recover from him what he obtains from the defendant. With respect to the other point, I am inclined to think that the drawer, not being satisfied by the acceptor, has a right to re-issue the bill. But upon this point I will reserve leave for a motion to enter a nonsuit.

Verdict for plaintiff, with leave, &c.

Wilde, Serjt., and *Kelly*, for the plaintiff.

Storks and *E. Lawes*, Serjts., for the defendant.

[Attornies—*Church* and *Wade*.]

In the ensuing Michaelmas Term, *Storks*, Serjt., moved, pursuant to the leave given; but the Court, on the authority of *Callow v. Lawrence* (a) were of opinion that the verdict was right, and

Refused a rule.

(a) 3 M. & S. 35.—“Where the drawer of a bill, payable to his own order, and indorsed by him to T., and by T. to B., upon the bill being dishonoured, paid the amount to B., who struck out his own and T.’s indorsement, and returned it to the drawer, and the drawer afterwards passed it to the plaintiff:—Held, that the plaintiff might recover against the acceptor.” See *Beck v. Robley*, 1 H. Bl. 89, n.

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Oct. 12th.

HALL and UX. v. WHITE.

If a person, who writes an answer to a demand made upon another person of certain things, says, that he has got them, and thereby induces the claimant to bring an action against him, he is liable to such claimant in detinue, although it does not appear that he had the general controlling power over the things.

DETINUE.—The female plaintiff was the surviving executrix of the last will and testament of a Mr. Edward Callaway; and the defendant was the co-executor of a Mr. Woolford, who had been the co-executor with Mrs. Hall of the will of the said Mr. Callaway; and the declaration stated, that the plaintiffs, as such surviving executrix, &c., delivered to the defendant certain deeds and writings, to wit, &c., of great value, &c., to be re-delivered by the said defendant to them, when he should be thereunto requested. Yet, that the said defendant, although afterwards requested, &c., had not delivered the said deeds and writings, or any of them, to the said plaintiffs, but still unjustly detained the same from them. There was a second count on a supposed finding (a).

The defendant pleaded, *first, non-detinet; secondly*, that the plaintiffs did not *deliver*; and *thirdly*, that they were not lawfully *possessed* of the deeds, &c., in the declaration mentioned, in manner and form as they had complained against him. These pleas concluded to the country, and the plaintiffs in their replication joined issue upon them. The deeds sought to be recovered had been in the possession of Mr. Woolford, Mrs. Hall's co-executor, till his death; and the evidence given to affect the defendant consisted principally of letters, which he wrote to Messrs. Watson and Broughton, the plaintiffs' attorneys, in answer to an application they made to Mr. Woolford on the subject.—The letters related to a proposed interview between the defendant and Messrs. Watson and Broughton, on the part of Mr. Callaway, the son of the deceased testator. The first letter contained this passage: "I have no objection to submit the deeds to Mr. Watson's perusal, nor to his taking extracts," &c. The second letter was, *inter alia*, as follows:—"At the proposed interview, you will not

(a) For the form, see 2 Chitt. Pl. tit. *Detinue*.

"think it unreasonable, on my part, in demanding from
 "your client every possible security; indeed, I am sure
 "you will bear me out in such demand: the security must
 "consist of a full discharge of all claims whatever on the
 "estate of the late Thomas Woolford, drawn up by my
 "solicitor, and signed by Mr. Callaway, he paying all ex-
 "penses attending the same, postages, and every other
 "expense that I have been wantonly put to. And you will
 "have the goodness to inform him that the deeds will not
 "be forthcoming unless these conditions be fully complied
 "with; and that he must come prepared accordingly."

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Andrews, Serjt., for the defendant, submitted, that, under the circumstances, he could not be charged with a *tort*, as it did not appear that he had the controlling power over the deeds, but merely that he had them for a short time, in order to produce them at a proposed meeting.

BEST, C. J.—If the defendant said, that he had the deeds, and thereby induced the plaintiffs to bring their action against him, I shall hold, that they may recover against him, although the assertion was a fraud on his part. It appears by his letter, that he did so say, and, therefore, I am of opinion that the verdict must be for the plaintiffs. His Lordship then left it to the Jury to give such damages as would compel the defendant to deliver up the deeds, and they accordingly found their verdict

For 450*l.* (a).

Wilde, Serjt., and *Busby*, for the plaintiffs.

Andrews, Serjt., and *Holt*, for the defendant.

[Attornies—*Watson & B.*, and *Smith & B.*]

(a) The judgment in *detinue* is for the recovery of the thing detained, *vel valorem inde*, and costs; Com. Dig. tit. *Pleader*, 2 X. 12. For the form of it, see Archb. Forms, 140.

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Oct. 17th.

BLACKMAN v. SIMMONS.

In an action for an injury by a vicious bull, the plaintiff recovered, although it appeared that the bull was attracted by a cow, in a particular state, which the plaintiff was driving past the field in which the bull was, and that the plaintiff first struck the bull on the head, to drive him away from the cow.

Seemle, that the owner of a vicious animal, after notice of its having done an injury, is bound to secure it at all events, and is liable in damages to a party subsequently injured, if the mode he has adopted to secure it proves to be insufficient.

THE *first* count of the declaration stated, that the defendant on, &c. was possessed of, and wrongfully and injuriously kept a certain bull in a certain close of his, near to a public highway, well knowing the said bull to be wild and vicious, and accustomed to attack and injure mankind; whereupon it became his duty to take due and proper means to confine the said bull, &c. Yet that the said defendant so negligently and improperly conducted himself in that behalf, and kept and secured the said bull in so careless, insufficient, and improper a manner, in and upon the said close, that afterwards, to wit, on &c., at &c. *by and through the carelessness, negligence, and improper conduct of the said defendant in that behalf*, the said bull escaped from and out of the said close, and then and there, with great force and violence, attacked and ran at and against the plaintiff, who was then and there passing near the said close, and then and there butted, threw down, and greatly bruised, hurt, and wounded the said plaintiff, &c. By reason whereof, &c. The *second* count charged, that the defendant did wrongfully and injuriously keep the bull, well knowing that it "was accustomed to attack, butt, and injure mankind," and that while he so kept it, it *attacked and ran at the* plaintiff, &c. The *third* count was very nearly like the first, except that it omitted all reference either to a close or a highway. Plea—Not guilty.

From the evidence it appeared, that the bull was kept in a field adjoining marsh land, at Tottenham, on which the inhabitants, at a certain season of the year, had a right of common for cattle. On the day of the injury, the plaintiff, who was a cow-keeper, and had cattle on the marsh, was accompanied by a lad, driving one of his cows, in "a particular state," past the field in question, for the purpose of taking her to a bull, at a farm a short distance

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off. There was only a shallow ditch between the field and the marsh. The defendant's bull ran along the field a short time, and then came through the ditch, and went to the plaintiff's cow. The plaintiff struck the bull on the head with a stick, to drive him away, and had nearly succeeded, when his stick broke, and the bull threw him down, and butted him while he was on the ground, and broke two of his ribs. Notice had been given to the defendant, of the bull's having run at a man previously; and, at the time of the accident, a strap and chain were fastened round the neck and one of the fore legs of the animal; but they hung so loosely as not to prevent his running. It was proved, that when the defendant was in treaty for the bull, he was told that he must be cautious, as it was very mischievous; upon which he said, that it would suit him all the better, as he wanted it to turn into a mead where he was annoyed by people fishing. And it also appeared, that, upon a gentleman saying, that he supposed he would not turn in the bull without giving notice to the public, the defendant's reply was, "let him give notice himself."

Taddy, Serjt., for the defendant, contended that he was not liable, as the plaintiff had brought the injury on himself, by his own imprudent conduct, in attacking the bull. The question is not, whether this bull had been at some time or other vicious, but whether the accident, under all the circumstances, would not have taken place with any bull, whether vicious or not. If the bull had been permitted to go with the cow, he would not have touched the plaintiff. The plaintiff has not been injured owing to the vice of the bull, as is charged in the declaration. The strap and chain put on by the defendant were notice to the public, that the bull was vicious.

BEST, C. J., (to the Jury).—The conduct of the defendant, in this case, has been most gross and wicked, and

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if death had ensued, he would have been guilty of manslaughter. The law ought to be known. If a person thinks proper to keep an animal of this description, knowing its vicious nature, and another person is killed by it, it will be manslaughter in the owner, if nothing more; at all events, it will be an aggravated species of manslaughter. We have heard much of steel traps and spring guns, but they are not so cruel as the mode which this defendant has adopted of guarding his supposed rights, and preventing his neighbours from fishing. It appears, that this bull was not sufficiently secured. If the plaintiff had gone where he had no right to go, that might have been an answer to the action; but the fact is not so. The plaintiff had a right to be where he was—he was in the pursuit of his ordinary business. I believe bulls, if they are not vicious, may be driven off by a man, under such circumstances as those of this case; but that is for you to say. If you are satisfied, upon the whole, that the injury occurred from the vicious nature of the bull, which the defendant knew, then you will find your verdict for the plaintiff; and if so, I think it is a case in which you are at liberty to give considerable damages.

Verdict for the plaintiff—Damages 105*l*.

Cross and Spankie, Serjts., and *Payne*, for the plaintiff.

Taddy and Wilde, Serjts., for the defendant.

[Attornies—*B. Whittington*, and *Webb & Tucker*.]

If one has a dog, used to bite sheep, and he bites a horse, it is actionable; for the owner, after notice of the first mischief done, should have destroyed him, or kept him from doing further injury. *Jenkins v. Turner*, 1 *Ld. Raym.* 109. See also *Smith v. P'elah*, 2 *Str.* 1264, where it was said by *Lee*, C. J., that a dog which has bitten a person ought to be hanged; and

if he bites people afterwards, the owner is responsible, because he might have effectually prevented it. See also, on the subject of injuries by vicious animals, the cases of *Buttendin v. Sharp*, *Salk.* 662; *Jackson v. Peshed*, 1 *M. & S.* 238; *Hartley v. Harriman*, 1 *B. & A.* 620; *Beck and Uz. v. Dyson*, 4 *Camp.* 198; and *Judge v. Cox*, 1 *Stark.* 285.

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HARWOOD v. GREEN.

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LIBEL.—The plaintiff was the master of a ship called the *Jupiter*, which was employed in the transport service, and the defendant was a lieutenant in the navy, who had been appointed by the Government as agent or superintendant on board that ship. The libel was contained in a letter addressed to the secretary at Lloyd's, and imputed to the plaintiff misconduct and incapacity in the management of the vessel. The pleas were—*First*, not guilty; *Secondly*, a justification of the whole of the libel; and *Thirdly* and *Fourthly*, justifications of particular parts of it.

The Secretary of Lloyd's was called as a witness, and stated that, in the reading-room there, a notice was fixed on a board, (that being the usual mode), stating that the letter in question might be seen by the parties interested,

He was asked by *Wilde*, Serjt., on his cross-examination, whether it had been the practice for officers in the navy to make communications to Lloyd's.

Taddy, Serjt., objected. If it was any part of the duty of an officer in the navy to make such communications, then it might be inquired into; but we cannot receive evidence of any *practice* in a case like this. A communication to Lloyd's, is no more than a communication to any other coffee-house.

Wilde, Serjt.—Lloyd's being the place where persons assemble who are connected with the maritime interests of the country, if it has been the practice for officers in the navy to send communications there, that may, go far, coupled with other circumstances, to shew *quo animo* the defendant in this case acted.

An officer in the navy has no right to make communications upon subjects, with which he becomes acquainted in his professional capacity, except to the Government, and, therefore, a letter, written to Lloyd's Coffee-house, about the conduct of the captain of a transport ship, by a lieutenant, who was superintendant on board, is not a privileged communication; nor can evidence of its being the practice for persons so circumstanced to make communications to Lloyd's, be received in an action for libel against such a person, either as furnishing a defence, in conjunction with other circumstances, or in mitigation of the damages to be recovered.

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BEST, C. J. — Do you offer it as an answer to the action?

Wilde, Serjt. — Not alone, but in conjunction with other circumstances.

BEST, C. J. — I am of opinion that an officer in the navy has no right to make any communication to Lloyd's, but only to the Government by whom he is employed. The Government, no doubt, would furnish all proper and useful information. But, I am clearly of opinion, that the party has no right to furnish it himself. If it were to be allowed, great mischief might follow; because he might take an incorrect or imperfect view of the subject; and the Government would consider the matter before they communicated any thing.

Wilde, Serjt. — I am not quite sure that I shall not be able to shew that these communications were at least *known* to the Government.

BEST, C. J. — If you shew me that the Government have *directed* them, I do not say that I will not receive the evidence. But I am clearly of opinion that it can furnish no defence to the action, though, perhaps, it may be received in mitigation of damages.

Taddy, Serjt. — I submit that it is not admissible, even in mitigation of damages. Every thing, as to the damages, turns upon the *nature of the communication*; and each particular case may differ in that respect.

Wilde, Serjt. — It is material evidence to shew the defendant's motives. If it is an unusual communication, made to an unusual place, that may induce the Jury to give greater damages than if it is not so.

Taddy, Serjt. — This would be introducing great laxity

in practice;—all turns upon the facts of the specific case in which the communication is made. It is only an attempt, by a side wind, to get rid of the general rules applying to justifications of libel.

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BEST, C. J.—What we are to try here is, whether the publication in question is a libel or not. There are certain things which are privileged communications; but I am of opinion that this is not of that description. If the defendant, instead of writing to Lloyd's, had written to the Navy Board, then it would have been impossible to maintain any action against him, unless it could be shewn that his statements were false to his knowledge. An officer in the navy is to make no communication, but to his employers. If this is not a privileged communication, then it stands upon the same ground as any other description of libel: therefore, what others have been in the habit of doing, can be no evidence in this case. Therefore, upon further consideration, I think this is not admissible, even in mitigation of damages. The question of motive goes to the defence, and is of no consequence upon the subject of damages, because the only inquiry, if the libel is not defensible, is as to what *compensation* the plaintiff is entitled to recover. I am much struck with my brother *Taddy's* argument, and I do not see by what test we can decide the matter; for the communications in each case may differ, and many of them may be innocent. To make any thing of it, it must be shewn that it is the practice of officers in the navy to write untruths, complaining of captains of vessels; and you see what a broad question that would open to us. The defendant has justified the libel, and our inquiry here is, first, whether he published it, and secondly, whether it is true. If it is partially true, that will operate in mitigation of damages; if it is wholly true, of course that will be an answer. My brother *Wilde* shall have leave to move, if he thinks I am wrong in my opinion.

Verdict for the plaintiff—Damages, 50*l*.

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Taddy, Serjt., and *Platt*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*T. Harrison*, and *Nelson*.]

Oct. 19th.

PARMETER v. BURRELL.

A. agreed to sell and B. to buy a ship, which A. undertook should be fitted similar to another ship. Before the time for completing the fittings, B. repudiated the contract, and refused to take the ship. Previous to this refusal, A. had done extras to the ship, at B.'s desire. A. did not go on with the fittings, but sold the ship, and brought his action against B. for the loss upon the sale. In his declaration he averred, that the ship was fitted "according to the form and effect of the agreement," and also, that it was ready for delivery at the proper time:—Held, that he could not recover on the special contract, nor for the extras, on the count for work and labour.

SPECIAL *assumpsit* on an agreement, by which the plaintiff agreed to sell, and the defendant to buy a vessel, called the *Snow*; which vessel was, by the terms of the agreement, to be coppered and fitted in every respect similar to a vessel called the *Rambler*. The declaration in the first and second counts averred, that the vessel was coppered and fitted in the same manner as the *Rambler*; and, in the third count, stated it to have been coppered and fitted in every respect, "*according to the form and effect of the agreement.*" The declaration also averred, that the vessel was ready for delivery. There were counts for work and labour, &c. The agreement was dated the 13th of May, 1826; and it appeared, that, shortly after that date, and before the time of completing the fittings, the defendant repudiated the contract, on the ground that the vessel was not of the tonnage which was mentioned in the contract. In consequence of this the plaintiff did not go on in making the vessel to correspond with the *Rambler*. The vessel was afterwards sold by the plaintiff, and this action was brought to recover the loss occasioned by such sale. Some extra work had been done to the vessel by the desire of the defendant, amounting to the sum of about 6*l*.

Wilde, Serjt., for the defendant, submitted, that the plaintiff must be nonsuited, as he had not proved performance of the contract he declared upon.

Spankie, Serjt., for the plaintiff.—After the defendant had refused to take the vessel, we had a right to sell in any way. After such refusal, these fittings became immaterial and unnecessary. Supposing it to be necessary to prove the averment in the declaration, there is reasonable evidence of our having *substantially* performed it. But I submit, that, under the circumstances of this case, it is rather an averment of form, as the defendant refused the ship before the arrival of the time at which they would have to be completed.

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R. V. Richards, on the same side.—It will be a question for the Jury, whether we have not substantially performed the agreement; at all events, we are entitled to a verdict for the extra work, not included in the contract. After the repudiation of the contract, we might have stopt, and not done any more to the vessel. We have complied with the third count, which states the vessel to have been fitted “according to the form and effect of the agreement.”

Best, C. J.—If you had not sold the vessel you would have been entitled to recover for the extras; but, by selling, you have put an end to the contract. What was done before the contract, must be taken as included in it. You have proved a sum of 6*l.* for things done after the contract by the defendant's order; but as you have sold the ship, with that work upon it, you cannot recover for it as for work and labour. There is a verbal difference between the third count and the others, but it is merely a verbal difference; the substance is the same in all. The plaintiff avers that he has performed his contract. That performance by him is a condition precedent to his recovering on that contract. The two first counts allude to the *Rambler* by name; the third only gives us the trouble of looking at the agreement. If you had stopt, that would have been another thing; but you go on, and you hold the defendant to the special contract; and you must, therefore, shew

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that you have fulfilled your part of that contract. When you went on, you did not do it according to your undertaking. You aver, that you had the ship ready for delivery, but that is not the fact, because you had it not in the state in which you contracted to put it. I am of opinion that the plaintiff must be called.

Nonsuit.

Spankie, Serjt., and *R. V. Richards*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*Oliveron & D.*, and *Reardon & D.*]

BEFORE MR. JUSTICE GASELEE.

Oct. 22d.

BLACKBURN v. BLACKBURN.

Communications made to a member of a dissenting congregation, respecting an individual about to be appointed a minister of that congregation, are privileged communications, and cannot be made the subject of an action by such individual. But if, in consequence of those communications, a

printed circular be sent round, containing contradictions of them, and reflecting on the motives of the party who made them, and such party afterwards write a letter, and send it to the writer of the circular, in which, after repeating the communications, he adds other statements, which he acknowledges he cannot prove, such letter is not privileged, but will make him liable in damages, though it be specially found by a Jury that he was not actuated by *express malice*. In such an action, a letter written to the defendant, containing a statement of the facts upon which he founded his charges, is receivable in evidence on his behalf, to shew the *bona fides* with which he acted. ...

LIBEL. The *first* count in the declaration stated, that the plaintiff, before, and at the time of committing the grievances complained of, was minister of a certain congregation of Protestant Dissenters, assembling for divine worship at a meeting-house in Bethnal Green, commonly called the Rev. John Kello's Meeting-House, &c.; and that certain rumours and reports having been circulated, injurious to the character of the plaintiff, a certain letter and statement had been and were published and circulated by the Rev. John Kello, minister, and Robert Garrett and John King, deacons, of the said congregation; in which

said statement there was contained, &c. (a), yet the defendant, well knowing, &c., but greatly envying, &c., and to cause it to be suspected and believed that the plaintiff had been *guilty of forgery*, and of the offences and misconduct thereafter mentioned, and to subject him to the penalties, &c., falsely, wickedly, and maliciously, did compose and write, and cause and procure to be composed and written, a certain false, scandalous, malicious, and defamatory libel, in the form of a letter, addressed to the Rev. John Kello, Robert Garrett, and John King, &c.; in one part of which said libel there was contained, &c. (b). And in another part of which said libel there was contained, &c. (c). And the defendant, further contriving, &c., inclosed the said libel in an envelope directed to the said Robert Garrett, &c., and then and there sent the said libel so inclosed as aforesaid, to the said Robert Garrett, and thereby then and there published the same.

There were three other counts, setting out, in different ways, different parts of the libel. The defendant pleaded, first, Not Guilty; and then two special pleas of justification, one affirming the truth of that part of the libel which was stated in the declaration, as charging the plaintiff with forgery, and the other of that part which charged him with fraudulent conduct. The replication was, *de injuria*; and issue was taken upon it.

The facts of the case were as follow:—The defendant, Mr. John Blackburn, was the uncle of the plaintiff, Mr. Samuel Blackburn, and resided at No. 126 in the Minories,

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(a) Here was set out, with infundoes, the printed statement, as it will appear in the account of the evidence, commencing with the words, "It was now that unpleasant rumours," and ending with the words, "any other meaning."

(b) Here was set out that part of the libel which commences with

the words, "Let me, then, in the first place, remind you," and ends with the words, "as groundless as they are injurious."

(c) Here was set out that part which commences with the words, "Respecting your reverend friend," and ends with the words, "who wax worse and worse."

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London. In the year 1814, at which time the plaintiff was a dissenting minister, near Canterbury, he became indebted to a person there, named *Blackley*, and being about to leave that part of the country, gave and indorsed to him a bill in the following form:—

“ £20:9:0.

London, July 28th. 1814.

“ Two months after
 der, the sum of twenty
 ling.

date, pay to me, or my or-
 pounds, nine shillings, ster-

To Mr. Sam^l Blackburn, }
 126, Minories,

Sam^l Blackburn.

The plaintiff then went to a place called Hempstead, and, just before the bill became due, inclosed a sum of twenty pounds to the defendant, accompanied by the following letter:—

“ Hempstead, September 28th, 1814.

“ Dear Sir,—Previously to my leaving Canterbury, I had occasion to give a bill for 20*l.* 9*s.*, which I made payable at your house. Inclosed, you will receive 20*l.* I will be obliged by your taking up the bill, and taking care of it till I come to town, when I will pay you the 9*s.* Please to present my best respects, &c.; I hope to be able to spend a few days in town before long, when I shall have the pleasure of seeing you. I remain, &c.,

Samuel Blackburn.”

The nine shillings were never paid. About a year after the writing of the above letter, some family disputes arose; and the plaintiff and defendant had no intercourse till the meeting alluded to in the plaintiff’s circular. In the year 1826, the plaintiff was about to be appointed assistant to the Rev. Mr. Kello, in the Bethnal-Green Meeting, when some statements to the same effect with some of those in

the libel, were made by a Mr. Sturtevant, a member of the congregation, for which an action was commenced against him, but discontinued, on his making an apology. It appearing that Mr. Sturtevant had received his information from the defendant, a meeting took place upon the subject, at which the bill of exchange was produced; and the defendant said, he could prove the charges which he had made against the plaintiff. In consequence of this, a circular was sent round to the members of the congregation, in the following form:—

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“ Bethnal Green, 15th February, 1827.

“ Dear Sir,—The object for which the following statement is transmitted to you is obvious, and therefore requires no comment. It is sent in the hope that, if the unfounded calumnies it refutes should have reached you, the minister they were designed to injure may be restored to the possession of the unimpeachable reputation, both in the church and in the world, we are persuaded he deserves. We remain, dear Sir, your affectionate friends and servants,

(Signed) John Kello, Minister of Bethnal Green Meeting.

Robert Garrett, }
 John King, } Deacons.

“ The increasing infirmities of the Rev. John Kello having rendered it expedient that regular assistance in his public labours should be procured, occasional supplies were engaged for part of the Lord's day, who met with various degrees of acceptance; and some painful differences of opinion having arisen respecting the right of procuring the assistance, which we all admitted to be necessary, led to the resignation of the deaconship of Mr. Briscoe. In this state of things, and subsequent to Mr. Briscoe's resignation, the Rev. Samuel Blackburn was invited, in August last, to preach a single sermon, which was so much approved as to induce an immediate application to him, by the Rev. J. Kello, and the deacons, for his future ser-

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vices; and thus he was engaged, from sabbath to sabbath, with increasing approbation, until, at the expiration of two months, a meeting of the church and congregation was publicly convened to consider of the propriety of inviting him to supply the pulpit, once on the Lord's day, for a specific period. At this meeting Mr. Briscoe and Mr. R. L. Sturtevant were present, and made several vague insinuations against the private character of Mr. Blackburn, which led to the postponement of the business for four days, to give time for further inquiries. Having received the most unexceptionable and satisfactory testimonies from those who had known Mr. Blackburn intimately for many years, added to the fact, that he had lived in great respectability in the immediate neighbourhood, for the last *nine* years, and as the opposing parties absented themselves from the second meeting, by which it might be inferred they admitted their previous opinions to be unfounded, an unanimous invitation for three months was agreed to, and transmitted to Mr. Blackburn, signed by the aged minister and deacons, on behalf of the church and congregation. From the increasing number of hearers, and some pleasing indications of usefulness, which had resulted from his ministry during these three months, towards the close of that period another public meeting was convened, which was more numerous than the former, and an invitation for an additional three months was unanimously agreed to. The Rev. John Kello, in conveying to Mr. Blackburn the request of the meeting, added, 'if the first invitation was unanimous, the second is enthusiastic.'

"It was now that unpleasant rumours, which were traced to Mr. R. L. Sturtevant, began to create uneasiness, and Mr. Garrett, the senior deacon, waited on him, and inquired what grounds he had for the reports he had circulated respecting Mr. Blackburn; the reply of Mr. Sturtevant was—Mr. Blackburn has put his uncle's name to a bill of exchange, which he was obliged to pay to prevent him from being prosecuted:—and stated some other circumstances, which, if true, involved the moral consistency

of Mr. Blackburn. The result of this conference was communicated to the Rev. J. Kello, who informed Mr. Blackburn of the serious imputations cast upon him. No sooner was the communication made to Mr. B., than he sought an interview with Mr. R. L. Sturtevant, and entreated him to accompany him instantly to his uncle, Mr. John Blackburn, No. 126, Minories; with whom he had held no sort of intercourse for the last twelve years. They went accordingly, and the said Rev. S. Blackburn having ascertained that Mr. Sturtevant had really received from Mr. John Blackburn some communications calculated to induce him to suppose that the imputation was well founded, a meeting was arranged for the following Thursday, at which were present Mr. Sturtevant, senr., Mr. R. L. Sturtevant, junr., Messrs. Garrett and King, the deacons of the church, and Mr. John Blackburn, from whom the injurious report had originated, and who was now requested to produce the bill on which he had rested his insinuations of fraud or forgery, or both. It is not for man to judge the motives of his fellow men, they can only be known to God. The following, however, are the facts, as clearly developed at this meeting. When Mr. John Blackburn was requested to produce the bill, he affected great reluctance, cautioned his nephew, the Rev. S. Blackburn, who appeared impatient for its production, that he would not be answerable for the consequences, if it were produced; and, in fact, led every person present to the painful conclusion, that the document would confirm the charge, and justify those who had brought it forward. At length the bill was exhibited, and found to be a simple bill of exchange, drawn thirteen years ago, accepted by Mr. Samuel Blackburn, and made payable at No. 126, Minories, his uncle's residence, where he occasionally resided when in Town; the necessary funds to meet the payment of the bill, except nine shillings, being also sent by him to his uncle, before the bill became due, in a letter, which was also produced, stating that such bill would be presented, and requested that it might be taken care of till he came to

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Town. In fact, the whole transaction was honourable and regular, and proved nothing but the evil disposition of the individual who could attempt to extract from it any other meaning.

“ In consideration of Mr. R. L. Sturtevant's having received the impression from Mr. John Blackburn, (though not expressed in language sufficiently explicit to make him legally responsible), and having consented to repair the injury, as much as possible, by publishing this refutation, and offering his apology, the Rev. S. Blackburn has consented to forego the legal proceedings he had commenced against him, he having had no object in taking such a course, but the complete vindication of his character from the aspersions cast upon it.

(Signed) Robert Garrett,
 John King,
 S. Sturtevant.

Witness, William Brown.

“ I, Richard L. Sturtevant, hereby express my deep regret for having been so far imposed on by the representations of Mr. John Blackburn, of No. 126, Minories, (the uncle of the Rev. Samuel Blackburn), as to make the injurious and unfounded imputations referred to in the foregoing statement, which I admit to be a correct representation of the facts and circumstances it professes to explain; and I sincerely hope it will have the intended effect of completely removing from the said Rev. S. Blackburn's character any suspicions which may have attached to it in consequence of such imputations.

(Signed) R. L. Sturtevant.

Witness, William Brown.

Dated this 15th February, 1827.”

One of these circulars was transmitted to the defendant himself, who shortly afterwards sent the following case for the opinion of Mr. Denman, the Common Serjeant:—

“ Samuel Blackburn being indebted to Mr. Blackley

of Canterbury, in the sum of 20*l.* 9*s.*, for goods sold, gave to him the following bill, [as stated *ante*, p. 148].

"The bill and acceptance are in the handwriting of the drawer, who, at the time he gave the bill, represented to Mr. Blackley that Mr. Samuel Blackburn, the pretended acceptor, was his uncle, and in the receipt of rents for him. This was in part false; for although his uncle did live at 126, Minories, at which place the bill was addressed, his name was not Samuel Blackburn, but John Blackburn; and he was not in the receipt of any rents for his nephew, or indebted to him in any sum; nor did he give him any authority to draw the bill upon him. By the day the bill became due, Samuel Blackburn sent to his uncle, John Blackburn, the amount of the bill, less nine shillings, which, when presented, was taken up by the uncle, with the money sent him by the nephew for that purpose: and the bill is now in the possession of the uncle. It will be perceived, that the transaction took place near thirteen years since; but circumstances have recently transpired, which make it necessary for the uncle of the drawer and acceptor of the bill to take opinion upon the following points.

"*First*, whether the acceptance was a forgery of Samuel Blackburn, he drawing and accepting the bill, and negotiating the same under the false representation before mentioned?

"*Second*, Whether, if it was not a forgery, it was an offence indictable at common law, for obtaining money under false pretences?

"*Third*, If the acceptance was a forgery, could the latter course have been adopted, so as to have avoided the necessity of indicting capitally?

"*Fourth*, Will the lapse of time prevent the parties from now proceeding in either way?"

Mr. Denman answered the first question as follows:—

"On the principle of *Mead v. Young*, 4 T. R. 28, I think the acceptance written on the bill, under the circumstances stated, was a forgery."

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The second and third questions he answered in the negative; and his answer to the fourth was in these terms:—
 “Lapse of time is not effectually a bar; but it would furnish strong ground for suspecting the evidence, and giving it every construction favourable to the prisoner; so that I could not, under any circumstances, now recommend a prosecution.”

The defendant then wrote and sent to the persons who had signed the circular, the following letter, which was the libel complained of:—

“To the Rev. John Kello, and Messrs. Garrett and King, the Pastor and Deacons of the Independent Church at Bethnal Green.

“Gentlemen,—By a printed paper, which you have circulated, bearing the date of 15th February, 1827, you have published a statement, respecting my conduct, which is so untrue in point of fact, and so defamatory in its tendency, that I have the assurance of my legal adviser that I could successfully prosecute you for a mischievous libel. I wish not, however, to resort to a mode of justification which, amongst believers, is forbidden by apostolic authority, especially as I anticipate that, when you are in possession of the facts I have to communicate, you will, as becometh Christians, confess your mistake, and retract the injurious statement you have circulated against me. And here permit me to premise that, however it might be insinuated that private and unworthy motives have excited my opposition to the Rev. S. Blackburn, I rejoice that I can appeal to the Searcher of hearts, my only consideration has been, what may best promote the real interest of truth and holiness, and the real interest of the kingdom of Christ. Indeed, to every considerate mind it must appear reasonable, that I should not needlessly desire to involve one who bears my name, and partakes of my blood, in a reproach which must necessarily lessen the general respectability of my family, in the opinion of all those who may be informed of the exposure. But, dear as my name and

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reputation may be, yet I trust the cause of Christ is still more dear to me; and solicitude for its interest, in connection with your church, has involved me in this most painful, though necessary, explanation. Let me, then, in the first place, remind you, that I did not seek for an opportunity to expose the conduct of the Rev. S. Blackburn, but that Mr. R. L. Sturtevant, as a member of the church about to choose that reverend person as their co-pastor, applied to me, in all the confidence of old acquaintance, to inform him what were my views of that individual's character. Now, as I considered it as one of the most fearful calamities that can befall a church, to receive as its pastor a man of questionable character, I did, in the confiding frankness of Christian intercourse, and upon his promise to keep the matter secret, inform him of that transaction to which your letter alludes, and which, associated in my mind with other facts, had produced impressions concerning the moral habits of the party concerned, which I will not now describe. I had, indeed, received statements from Tonbridge Wells, Canterbury, and Luton, respecting the character of the Rev. gentleman, whilst travelling in the Wesleyan methodist connection, no way to his honour; but I could not prove them: statements from the counties of Nottingham and Derby, unsought for by me, upon the authority of some of the most respectable ministers in those districts, that the conduct of the individual in question, when an independent minister in their neighbourhood, was not irreproachable; but then I could not substantiate them. Yet these statements, supported by creditable testimony, together with the facts in my own possession, produced an amount of moral evidence, the force of which I shall feel as long as I live: And therefore I did think it a duty to my friend Sturtevant, and to the church at Bethnal Green, to put him in possession of the facts of that bill transaction, which, in my own judgment, includes both falsehood and fraud. How far my confidence was betrayed by Mr. R. L. Sturtevant, you well know, and that I was compelled to maintain my own vera-

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city by producing the bill in question at the meeting you describe, and which I attended without even a friend to witness for me the statements which were made. The transaction of that evening you thus describe: [Here that part of the printed circular was stated, which contains an account of the meeting on the subject of the bill. It then proceeded thus:]—I admit your statement in the general, but deny that the reverend gentleman ever resided in my house, or ever slept there more than one night. If you recollect, I cautioned your reverend friend respecting the consequences, because I believed it was fraudulent in its character, and might involve penal results of no desirable kind. How far my impressions were correct, you will learn from the opinion of Thomas Denman, Esq., the Common Serjeant of London, who, as one of the Metropolitan Judges, may be supposed competent to decide that question. Permit me, however, first to lay before you the case which has been submitted to that learned gentleman, the facts of which can be substantiated on oath. [Here the case was set out as *ante*, pp. 152-3, but only the first question and the answer to it were given. The libel then proceeded thus:] To this measure have I been driven in my own defence by your indiscreet zeal, and with you must rest all the consequences of this exposure. I presume, however, gentlemen, that this judicial opinion will cause you to feel that the statement, to which you have lent your sanction, 'that the whole transaction was honourable and regular,' is somewhat doubtful; and that your charges of 'imposition and evil disposition' are as groundless as they are injurious. I now, then, solemnly call upon you, as the officers of a church of Christ, who ere long will be our judge, to take those measures which Christian equity demands, to remove from my character those imputations, which, without provocation, you have cast upon it. I do not wish to publish these things to the world; it is fearful enough that the church should hear those things which would make the enemies of godliness to triumph; but from you they could not be

withheld. Respecting your reverend friend, I wish only to add, that, if he were prepared, with the ingenuousness of Christian repentance, to confess his past indiscretions and sins, no one would rejoice more sincerely in the evidence of his penitence, and in the prospect of his usefulness, than myself; but if he proudly denies facts which are notoriously true, I can only anticipate, that he will be found, like 'evil men and seducers who wax worse and worse.' Waiting your reply, I am, gentlemen, your faithful servant,

(Signed) John Blackburn.

Minorities, May 19th, 1827."

Mr. Garrett, one of the deacons of the meeting, was called on the part of the plaintiff; and he admitted, on his cross-examination, that, after the plaintiff was suspended, he made inquiries in the different counties mentioned in the libel as to the plaintiff's character, the results of which he considered himself bound in honour and integrity not to disclose; but he stated that the answers were not satisfactory, and were among the reasons which prevented the plaintiff's re-appointment.

Cross, Serjt., for the defendant, contended, that, under the circumstances, the defendant's letter was a privileged communication; and also, that the declaration was not proved, inasmuch as it alleged the plaintiff to have been charged by the defendant with forgery; and the defendant's statement could not be said to have that meaning. He then offered in evidence a letter, dated 14th September, 1815, addressed to the defendant, purporting to come from Blackley, and stating that the plaintiff had represented, at the time of giving him the bill, that the acceptance was the defendant's, and that the defendant was the person who received his rents in London.

Wilde, Serjt, for the plaintiff, objected.

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GASELEE, J.—I think the letter is admissible for the purpose of shewing the *bona fides* of the defendant's conduct.

Blackley was then called as a witness. He stated, that the letter in question was not in his handwriting, but another person wrote it for him from his dictation; and that he could not recollect whether its contents were true, as the transaction occurred so long ago. It was proved that the plaintiff paid for the printing of the circular letter; and it appeared, on inspection of the bill, that the mode of making the S differed in the signature to the drawing and acceptance.

GASELEE, J., (after ascertaining from the Jury that in their opinion the special pleas were not proved, in summing up, said,)—I think the original communication made by the defendant to Mr. Sturtevant, and the verbal communication at the meeting, were both of them confidential and privileged; and if it had stopped there, no action for libel could have been maintained by the plaintiff. But I think that the plaintiff's printed statement is not a justification of the defendant's letter, and does not make it a privileged communication, especially as that letter contains representations which had not been previously made, about accounts from Tonbridge and other places, which the defendant admitted he could not prove. It strikes me, that this is going beyond the line of self-defence. But in case the Court should be of opinion that I am wrong, and that the defendant's letter is privileged, I will thank you to give me your opinion as to whether the defendant was actuated by express malice; because express malice would have the effect of destroying the privilege. In deciding the question of damages, you are at liberty to take into consideration the whole of the defendant's letter, though a part of it only is set out in the declaration; and it is for you to say, whether you think

that letter is merely an answer to the observations upon the defendant, made in the plaintiff's circular. You are also at liberty to consider, in estimating the amount of the damages, the nature and extent of the provocation given to the defendant by that circular. You will also say whether you are satisfied that the libel intended to impute forgery to the plaintiff.

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The Jury found a verdict for the plaintiff—
 Damages, 50*l.*, saying, that they were
 of opinion that the libel imputed for-
 gery, but that the defendant was not
 actuated by express malice.

Wilde, Serjt., and *Platt*, for the plaintiff.

Cross, Serjt., and *Comyn*, for the defendant.

[Attornies—*Harrison*, and *Rush*.]

In the ensuing Michaelmas Term, rules were obtained on the part of both the plaintiff and defendant, which, in the course of that Term, came on to be argued together. In the course of the argument, reference was made to Buller's Law of Nisi Prius (*a*), Blackstone's Commentaries (*b*), and the cases of *Edmonson v. Stevenson* (*c*), *Herver v. Dowson* (*d*), *Smith v. Richardson* (*e*), *Crawford v. Middleton* (*f*), *Weatherston v. Hawkins* (*g*), and *Bromage v. Prosser* (*h*).

The Court were of opinion, that the ruling at *Nisi Prius* was right; that the communication was not privileged; and that such being the case, it was not necessary to shew express malice (*i*).

(*a*) Pp. 8, 9.

(*b*) Vol. 3, p. 125.

(*c*) Buller, P. 8.

(*d*) *Ib.* Willes 24.

(*e*) Willes, 24; Buller, 9.

(*f*) 1 Lev. 82.

(*g*) 1 T. R. 110.

(*h*) *Ante*, Vol. 1, pp. 475, 673.

(*i*) For an account of the argument in bank, and a fuller statement of the pleadings, see 1 Moore & Payne's Common Pleas Rep. p. 33.

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BEFORE MR. JUSTICE GASELEE.

Oct.

GETTING v. Foss, Gent.

A circular letter sent by the secretary to the members of a society for the protection of trade against sharpers and swindlers, furnishing information respecting certain bill transactions, is not a privileged communication. *Seemle*, that if such letter *state particular facts*, it will not be a libel, though some of the persons receiving it, believed that it was sent to intimate that the parties mentioned in it were common sharpers and swindlers. *Aliter*, if it contain a *general statement*, such as, that the party mentioned in it is considered an improper person to be proposed to be balloted for as a member of the society. At all events, in the former case, it is a question for the Jury, whether the society really and *bona fide* intended to give the *particular information* which the letter contains.

ACTION for a libel contained in the ninth correspondence of the Society for the Protection of Trade against Sharpers, and Swindlers, of which society the defendant was secretary. Plea—The general issue, and a justification of the truth of the statements contained in the libel.

The libel was contained in a circular addressed by the secretary to the different members of the society, and stated that he was desired to inform them, that bills were then in negotiation purporting to be drawn at Edinburgh, by E. Boyd, which were accepted by the plaintiff, and made payable at Messrs. Williams, Deacon, & Co's., bankers, in London, who were found, on application, to know nothing about the parties.

For the plaintiff, three witnesses were called, members of the society, who had received the letter; and they stated, that they believed the object of the circular letters was, to let all the world know that the persons whose names were inserted in them, were common swindlers and sharpers; and that, without referring to the particular facts stated, they thought that the defendant must have got such information as convinced him that the plaintiff was a swindler and a sharper, and a person of bad character, with whom the members ought not to have dealings. From the cross-examination of these witnesses, it appeared that they had never attended any of the society's meetings, but spoke only of the intention of the circulars from their own impressions.

Wilde, Serjt., for the plaintiff, cited the case of *Goldstein v. Foss* and Another (a), in which it was held, that a

statement in a circular like the present, that the plaintiff was considered an improper person to be proposed to be balloted for as a member of the society, was a libel.

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Spankie, Serjt., for the defendant.—This case differs from that. The society mean to give a caution, and they state the facts upon which the caution rests. The communication is confidential. If it had been sent to Lloyd's, it might be a libel, but it is only circulated among the members of the society. The witnesses have said that they understood the letter to convey the idea that the plaintiff was a swindler. But we are not to be bound by the heedless interpretation of the parties receiving it. If a party, without any foundation, chooses to draw such an inference, is that to affect us? The information is important to be given, and it contains no charge. It does not, without the most strained construction, intimate that the plaintiff was a swindler and a sharper. The question is, whether the communication was warranted by the facts. If the defendant had not made the communication, he would have abandoned the objects for which the society was formed. It is clear law, that if I know that a friend of mine may be injured in a particular transaction, I have a right to give him a warning, and say, have no dealings with such and such men; and the question, in that case, will be one of *bona* or *mala fides*.

GASELEE, J.—Such general statements as came before my Lord TENTERDEN, in the case which has been cited, might be taken to have the meaning which is there put upon them; but I shall leave it to the Jury to say, whether, in the present case, there has been such a general charge, or whether the society intended really to give the particular information which the letter contains. With respect to privilege, I do not think that the letter comes within the class of confidential communications.

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After some evidence had been given on both sides, as to the truth of the statements in the letter, an arrangement was made between the parties, by which

A verdict was taken for the plaintiff on the general issue, with nominal damages, the defendant disclaiming any charge of swindling; and the Jury were discharged from giving a verdict upon the special plea.

Wilde, Serjt., and Parke, for the plaintiff.

Spankie, Adams, and Storks, Serjts., for the defendant.

[Attornies—*Willis & Co., and Foss.*]

*Second Sitting at Guildhall, in Michaelmas
Term, 1827.*

BEFORE MR. JUSTICE GASELEE.

Nov. 22nd. WALTON, Assignee of JEREMIAH NATHANSON and MYER WASSER DRUDENGER, Bankrupts, v. DODSON.

A guarantie for goods, addressed to one of two partners, may be declared on, as given to both, if it appear that the partner to whom it was addressed did not carry on any separate business.

A guarantie not addressed to any one, must be declared on as given to the party to whom or for whose use it was delivered.

ASSUMPSIT on two guaranties. The declaration stated, that, in consideration that the said Jeremiah and Myer Wasser, before their bankruptcy, would sell and deliver to one Levin such goods as he might require of them in the way of their trade and business, the defendant undertook, and then and there faithfully *promised the said Jeremiah and Myer Wasser to guarantee* and be answerable to them for such goods, to the amount, &c. There

were several counts (a), but they all stated the promise and undertaking as made to both the bankrupts. Plea—*Non assumpsit*.

When the guaranties were read, it appeared that one of them was addressed to Nathanson only.

Wilde, Serjt., submitted, that on this the plaintiff was not entitled to recover, as it was stated in the declaration to have been given to Nathanson and Drudenger.

GASELEE, J., inquired if the bankrupts were in business together? and was answered, that they were, and that Nathanson did not carry on any separate concern.

Wilde, Serjt.—The contract is with one only, and the rule, as to unity of interest, does not apply to the case of a guarantie.

GASELEE, J.—I think it is sufficient.

The other guarantie had no address at all.

Wilde, Serjt.—Though your Lordship has decided that a guarantie, addressed to one of two partners, will enure for the benefit of both; yet I hope that you will not think that a guarantie, not addressed to either, is in the same situation.

GASELEE, J.—Such a guarantie will enure to the benefit of those to whom, or for whose use, it was delivered.

Verdict for the plaintiff, for 25*l.*, on one guarantie only.

(c) PRACTICE.—In an undefended cause, which was tried in the King's Bench, at the third Sitting in Hilary Term (February 11th), 1828, Mr. Justice Little-*dale* observed, that it would much facilitate reference, if attornies, in

engrossing their records, and also in making copies of paper books for the Judges, would denote, in the margin, by the words "first count," "second count," and so on, the commencement of the different counts of a declaration.

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Taddy, Serjt., and *Chitty*, for the plaintiff.

Wilde, Serjt., and *Payne*, for the defendant.

[Attornies—*Shave*, and *B. Whittington*.]

Sittings at Westminster, after Michaelmas Term,
1827.

BEFORE LORD CHIEF JUSTICE BEST.

Nov. 29th.

DOE, on the Demise of TILT, *v.* STRATTON.

Where a party occupies under an agreement for a lease during the whole of the term for which the lease was to be granted; a notice to quit is not necessary at the end of such term, as the agreement is evidence of the expiration of the tenancy as well as of the other terms of the holding.

EJECTMENT. Plea—Not guilty.

The defendant held under an agreement dated the 7th Sept. 1820, by which, in consideration of 50*l.*, and of the rent, matters, and agreements thereafter contained on his part, the lessor of the plaintiff promised and agreed that he, his heirs, or assigns, should and would, on or before the 29th day of September, then next ensuing, upon request made to him or them in writing, for that purpose, grant and execute unto him, his executors, administrators, and assigns, a good and effectual demise or lease, by indenture, of all, &c. [the premises sought to be recovered.] To hold the same unto the said defendant, his executors, &c. for the term of seven years; to be computed from the 29th day of September then instant, at the yearly rent of 100*l.* clear, &c. payable, &c. And it was mutually agreed that the said lease should contain covenants on the part of the defendant, for the payment of rent; to keep the premises in tenantable repair, &c. and to quit and deliver up possession at the end of the term; and also a proviso empowering the lessor of the plaintiff to re-enter on non-payment of rent, or on non-performance

of any of the covenants. No lease was granted or demanded. The term expired at Michaelmas, 1827, and the defendant not having quitted, this action was brought to recover possession.

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Jones, Serjt., for the defendant, contended, that he was entitled to a notice to quit, as he must be considered as holding as tenant from year to year, no lease having been executed. Where a lease is executed in pursuance of an agreement, the efflux of time is of itself notice. But if the parties proceed on the terms of the agreement, the defendant enters into possession as tenant from year to year, and then, although it may be true that, with regard to the terms of the holding, the agreement may be good, yet it is not with respect to the collateral matter of forfeiture. The case of *Mann v. Lovejoy* (a) decides, that where the occupier, under an agreement for a lease at a certain rent, pays the rent, he *becomes tenant from year to year*, and the landlord may distrain. And in the case of *Hammerton v. Stead* (b), Mr. Justice *Littledale* observes: "It is unnecessary to say whether the instrument in question is or is not a lease; for where the parties enter under a mere agreement for a future lease, they are tenants at will; and if rent is paid under the agreement, they become tenants from year to year, *determinable on the execution of the lease* contracted for, that being the primary contract. But if no rent is paid, still, before the execution of a lease, the relation of landlord and tenant exists, the parties having entered with a view to a lease and not a purchase."

V. Lawes, Serjt., for the plaintiff, contended, that he was in the same situation with respect to the necessity of

(a) R. & M. 355.

(b) 3 B. & C. 478, and 5 D. & R. 206.

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notice, as if a lease had been granted and suffered to run out. The agreement is evidence of the expiration of the tenancy, as well as of the other terms of the holding.

Holroyd, on the same side, referred to *Doe v. Breach* (a) as a case in point; and also to *Doe v. Smith* (b), *Morgan v. Bissell* (c), *Dunk v. Hunter* (d), *Colley v. Streeton* (e), and *Clayton v. Burtenshaw* (f), as containing observations bearing upon the subject.

BEST, C. J.—I am of opinion that the plaintiff is entitled to recover. I think that if, during the seven years, they had wished to put an end to the tenancy, they must have given notice, but not at the end of the term. I think this is the common sense of the thing. But as there are cases on the subject, I will give the defendant leave to move to set aside the verdict for the plaintiff, if the Court shall think fit.

Verdict for the plaintiff—Damages 1*s.*, subject, &c.

V. Lawes, Serjt., and *Holroyd*, for the plaintiff.

Jones, Serjt., for the defendant.

[Attornies—*Argill & M.*, and *Ashfield*.]

IN the ensuing Hilary Term, *Jones*, Serjt., moved, pursuant to the leave given, but the Court refused a rule.

(a) 6 Esp. N. P. C. 106. This case decides, that if a tenant holds under an agreement for a lease, which specifies the covenants to be in the lease, with a right of entry for a breach of them, an ejectment may be sustained on any breach, though no lease has ever been executed.

(b) 6 East, 530.

(c) 3 Taunt. 65.

(d) 5 B. & A. 322.

(e) 3 D. & R. 522, and 2 B. & C. 273.

(f) 7 D. & R. 800, and 5 B. & C. 41.

Sittings in London, after Michaelmas Term, 1827.

BEFORE MR. JUSTICE PARK.

(*Who sat for the Lord Chief Justice.*)

GOODMAN v. KENNEL.

Nov. 30th.

THIS was an action brought to recover compensation in damages, for an injury which the plaintiff had received from a horse, which a man named Corkin, an occasional servant of the defendants, was riding. It appeared that the defendant, who was a surveyor, occupied a house at Kennington, jointly with a gentleman named Freshfield, who kept a horse in a stable behind the house, where the defendant also had previously kept one, but had not one at the time of the accident. On the day on which the accident happened, the defendant sent Corkin with a book into Holborn, and gave him a shilling for his trouble, before he went. Corkin, who had been in the habit of exercising Mr. Freshfield's horse, went to the stable and took it, (without any orders from his master, and without communicating either to him or Mr. Freshfield what he was about to do), and rode it to Holborn, and was on his way back when the injury happened.

If a master sends his servant on an errand, without providing him with a horse, and the servant takes one, and rides it in the doing of such errand, and an injury happens in consequence, the master is not liable in an action for damages by the party injured.

Mr. Freshfield was called as a witness, and proved that he had expressly desired Corkin never to ride his horse on any errand *into London*. There had been an investigation at a police office, and contradictory evidence was given with respect to some statements of the defendant before the magistrate, on the subject of the ownership of the horse. And there was also contradictory evidence as to whether the defendant and Mr. Freshfield had been in the habit of mutually using each other's horses.

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Wilde, Serjt., for the plaintiff.—Every master is liable for his servant's acts, when that servant is engaged in the execution of his commands.—It is of no consequence, in this case, whether the horse belonged to the defendant or not. The principle is this: if you have the benefit of the man's services, you must be responsible for his misconduct. The question is this, was Corkin in the course of his employment by Kennell; for if he was, whether he chose to go on horseback or on foot, if the injury happened by his misconduct, Kennell is liable.

PARK, J.—I cannot bring myself to go the length of supposing, that if a man sends his servant on an errand, without providing him with a horse, and he meets a friend who has one, who permits him to ride, and an injury happens in consequence, the master is responsible for that act. If it were so, every master might be ruined by acts done by his servant without his knowledge or authority. His Lordship then left to the Jury the contradictory evidence as to the ownership of the horse, and the question as to any implied authority from the defendant to Corkin to use it; and they found a

Verdict for the plaintiff.—Damages, 60*l*.

Wilde, Serjt., and Thesiger, for the plaintiff.

Taddy, Serjt., for the defendant.

[Attornies—*Meggy, and Evans & H.*]

In the ensuing Hilary Term, *Taddy, Serjt.*, moved to set aside the verdict, on the ground that there was no evidence to go to the Jury, as to the defendant's ownership

The case of *M^r Manus v. Crickett*, 1 East, 106, decides that a master is not liable in trespass for the wilful act of his servant, (as by driving his master's carriage against another), done without the

direction or assent of the master; but that he is liable to answer for any damage arising to another, from the negligence or unskilfulness of his servant acting in his employ.

of the horse, or his assent to his servant's using it. But the Court refused a rule, expressing it as their opinion, that the summing up was perfectly correct, and that the whole of the case had been properly put to the Jury.

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Adjourned Sittings in Middlesex, after Michaelmas Term, 1827.

BEFORE MR. JUSTICE PARK.

DAVIS v. CROWDER and Another.

Dec. 1st.

ACTION against the sheriff of Middlesex for a false return of *nulla bona* to a writ of *fi. fa.*, issued in a cause of *Damon v. Steward*. The plaintiff was the assignee of Damon, under the Insolvent Debtors' Act.

The party, who was defendant in a suit, cannot, in an action against the sheriff for a false return to a *fi. fa.*, issued in that suit, be called as a witness for the defendant, to shew circumstances from which the Jury might infer that no debt was actually due by him.

On the part of the defendants, Steward was called as a witness, and *Taddy*, Serjt., admitted that he called him, to shew circumstances from which the Jury might infer, that no debt was actually due from him to Damon.

Wilde, Serjt., objected, on the ground that the witness was interested.

Taddy, Serjt.—He cannot avail himself of his own evidence. He cannot be benefited by this cause.

PARK, J.—I cannot fathom all the possible ways in which he may be benefited. I am of opinion that his evidence ought not to be received. If I am wrong in that opinion, you may move the Court upon the subject.

Verdict for the plaintiff(a).

Wilde, and *V. Lawes*, Serjts., and *Chitty*, for the plaintiff.

Taddy, Serjt., and *Hutchinson*, for the defendants.

[Attornies—*R. Hill*, and *F. Smith*.]

(a) No motion was made.

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BEFORE MR. JUSTICE GASELEE.

Dec. 3rd.

SEAGOE v. DEAN.

A. agreed with B. by parol, that if B. would take of him a lease for twenty-one years, of certain premises, he would give 20*l.* towards putting them into repair. B. accepted the lease, and A. refused to pay the money:—
Held, in an action for it, that an admission by A. that the money was due, entitled B. to recover upon the account stated.

THE first count in the declaration stated, that in consideration that the plaintiff would become tenant to the defendant, of a certain cottage, &c. at a yearly rent of 39*l.*, under a lease for twenty-one years, to be granted, &c.; the defendant undertook that he would pay the plaintiff 20*l.* towards the repairs of the premises, and that he would make a certain opening, &c. &c. The second count was similar, except that it omitted the promise to make the opening. There were the usual money counts, and an account stated.

The plaintiff was a widow, and her daughter was called as a witness, and stated that she was present at a conversation between the defendant and her mother, in which the defendant said, that if her mother would take a lease of him for twenty-one years, at 39*l.* a year, he would open a place for the deposit of coals, and give her 20*l.* toward the general repairs of the premises. It was also proved, that the defendant on one occasion said, I know I owe the money, but I cannot be compelled to pay it, because the only person to prove the agreement is the plaintiff's daughter, and she cannot be a witness; and on another occasion he made a similar acknowledgment of the debt, and said he could not pay it then, but would deduct it out of the next quarter's rent. The lease was taken by the plaintiff. The parol agreement was made on the 1st of January, and the lease was dated in February; and was to hold from the Christmas preceding. The 20*l.* was demanded when the first quarter's rent was due.

Wilde, Serjt., for the defendant, objected that the parol evidence was not admissible. This is one of the cases to which the statute of frauds particularly applies (a).

GASELEE, J.—I am of opinion, that it is a matter quite distinct from the lease. I think the evidence is receivable, and that the plaintiff is entitled to a verdict upon the account stated. But I will give you leave to move to enter a nonsuit.

Verdict accordingly.

Andrews, Serjt., and *Hutchinson*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*H. Chester*, and *Pearce & Co.*]

IN the ensuing Term, *Wilde*, Serjt., moved, pursuant to the leave given. According to the declaration, it is one entire contract, and relates to the granting of a lease, and therefore, by the statute of frauds, it ought to be in writing. Also, as the lease has been executed, we must look to that for the terms of the contract, and we do not find there any thing about this payment; the lease must be taken to contain the consideration. As to the account stated, it does not appear, whether the repairs had been done at the time of the conversation relied on, and the admission is connected with the contract, and the contract is for becoming tenant under a lease. Up to the execution of the lease there was no binding contract.

BEST, C. J.—If the plaintiff was bound to rest his claim upon the special counts, I think he could not recover. But I consider the admission as evidence upon the account stated, and I do not think that the statute of frauds stands in the way of this decision, for although, under that statute the original contract might be void, yet there was a moral obligation to pay, which I think the law will convert into a legal one. There is an abundance of cases which go to shew, that notwithstanding a failure of the original contract, if there be a moral obligation, it will support a subsequent promise.

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PARK, J.—I think this case was properly decided on the account stated; I do not think the 20% has any thing at all to do with the lease.

BURROUGH, J., concurred.

GASELEE, J.—If this action had been against the landlord for not granting, or against the tenant for not accepting the lease, the objection must have prevailed; but I take it to be every day's practice, that although a party might not be bound if he stood on his legal objections, yet, if he afterwards acknowledge that the money is due, it may be recovered on the account stated.

Rule refused.

BEFORE MR. JUSTICE BURROUGH.

Dec. 4th.

DUNCAN v. MEIKLEHAM.

In an action of replevin against a broker, a person who, at the time of the distress, was in partnership with such broker, but who, at the time of the trial, had ceased to be his partner, is a competent witness for him.

In such action, if it be proved that the landlord employs the attorney to defend the broker, that is sufficient evidence of the broker's authority to distrain in the absence of any written warrant.

REPLEVIN. The defendant made cognizance in the third plea as bailiff of one Fisher. To prove the authority to distrain, a witness was called, who stated, that at the time of the distress he was in partnership with the defendant Meikleham, and that Meikleham acted in the matter on the behalf of the partnership. The partnership had since been dissolved.

Wilde, Serjt., submitted, that he was not a competent witness, as he would be liable to contribution in the event of the defendant's losing the verdict, and having to pay the costs.

Spankie, Serjt., contended, that, in such a case the act would be found to be a trespass, and one trespasser cannot require contribution from another.

Wilde, Serjt.—A broker making a distress is not that kind of trespasser who cannot require contribution.

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BURROUGH, J.—I am of opinion that the witness is competent.

The warrant from Fisher to the defendant was not forthcoming, and to supply the deficiency, *Spankie*, Serjt., for the defendant, called Mr. Chamberlain, his attorney, to prove that Fisher employed him to defend the action.

Wilde, and *Jones*, Serjts., submitted, that this was not enough. The question is, whether the defendant had authority *at the time of the distress*. The subsequent conduct of Fisher cannot give him that authority, if he had it not before. If it could, a man, having committed a trespass, might, after action brought, get a confirmation of his conduct, by some person having a right, and thereby defeat the action.

BURROUGH, J.—On the evidence as it now stands, Fisher is the landlord of Duncan, and he adopts the act of the party distraining. I am of opinion that the circumstance of Fisher's being the landlord, connected with the ratification, is quite sufficient.

Verdict for the defendant on the third cognizance.

Wilde, and *Jones*, Serjts., and *Pratt*, for the plaintiff.

Spankie, Serjt., and *Chitty*, for the defendant.

[Attornies—*Elkins & Son*, and *Chamberlain*.]

See the case of *Wooley v. Batts*, Vol. 2, of these Reports, page 417, and the case there cited.

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If in an action on a bill of exchange, given for goods sold, it be proved that the bill was fetched away by the plaintiff's servant, from the house of a third person, after the commencement of the action, and only a short time before the trial, such evidence will not make it necessary for the plaintiff to prove that he, at the time of action brought, was the holder of the bill, and entitled to sue upon it.

BURDON v. HALTON.

ASSUMPSIT on two bills of exchange given for goods sold.—The bills of exchange were given by the defendant to the plaintiff, and more than covered the amount of his demand. It appeared that about a fortnight before the trial, and some time after the commencement of the action, the bills in question were fetched by the plaintiff's servant, (who went with a sealed letter, the contents of which did not appear), from the house of Messrs. Brown & Brind, in whose hands they were; but there was no evidence either of the mode in which they had obtained them, or when, or on what consideration. No money was paid by the plaintiff's servant when he brought them away.

Jones, Serjt., upon this contended, that, as Messrs. Brown & Brind appeared to have been in possession of the bills at the time when the action was brought, and could have sued upon them, the plaintiff was not entitled to recover, as it was clear that the plaintiff could not be liable, on the same day, to two parties, the indorsee and the indorser.

BURROUGH, J., was of opinion, that, under the circumstances of the case, the plaintiff was entitled to a verdict.

Verdict for the plaintiff.

Andrews, Serjt., and *Wallinger*, for the plaintiff.

Jones, Serjt., for the defendant.

[Attornies—*Abraham*, and *Rawlinson*.]

In the ensuing Hilary Term, *Jones*, Serjt., moved for a new trial. He cited *Kearslake v. Morgan*, 5 T. R. 513,

and *Dangerfield v. Wilby*, 4 Esp. 159 (a), and contended, that it lay upon the plaintiff to shew that he was entitled to sue at the time of action brought, and that the evidence at the trial raised a presumption against him, which it was incumbent on him to rebut.

The Court were of opinion, that the point, with respect to the liability of the defendant, was not raised, as it was quite consistent with the evidence, to presume that the bills might have been sent to Messrs. Brown and Brind, only a few days before they were got back.

Rule refused.

(a) See Bayley on Bills, 4th Edit., p. 292.

BEFORE MR. JUSTICE GASELEE.

BARTRAM, Esq. v. PAYNE and Others.

Dec. 5th.

TROVER for a carriage.—The plaintiff was a Major in the 12th Lancers, and the defendants were the assignees of a Mr. McNeil, a coachmaker, who became bankrupt in May, 1827. It appeared that the carriage in question was finished in the beginning of January, 1827, and on the 9th of that month the price of it was paid; but as the plaintiff was about to go with his regiment to Portugal, it was arranged that the carriage should remain, free of expense to the plaintiff, on the premises of the bankrupt, for six months, or longer, till the plaintiff should return to England. The crest of the plaintiff was painted on the panels, and embossed upon the handles of the doors. The carriage was placed in the front shop of the bankrupt; and while it was standing there the bankrupt sold it to a gentleman named Innes, and put his crest

A carriage finished and paid for before the bankruptcy of the maker, but suffered to remain on his premises at the request of the owner, on account of his being abroad, cannot be taken by the assignees as in the order or disposition of the bankrupt, although such bankrupt put it in his front shop, and actually sell it to another. In such case, an actual delivery of the carriage at the

house of the person for whom it was made, is not necessary to constitute him the owner.

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upon it instead of the plaintiff's; but told him, at the time of the sale, that it was Major Bartram's carriage. The price of the carriage to the plaintiff was 260*l*.

A witness stated, that it is usual for coachmakers, when they have built a good carriage, to put it in their show room, previous to sending it home to the parties for whom they made it.

Taddy, Serjt., for the defendants, contended, that they had a right to detain the carriage, under the 72d section of the bankrupt act, 6 Geo. 4, c. 16. The words in the stat. of James were, "possession, order, *and* disposition:" in the present act they are "possession, order, *or* disposition." The fact of the bankrupt's selling the carriage is strong in the defendants' favour (a).

GASELEE, J.—I do not think that the bankrupt's selling it makes any difference.

Taddy, Serjt.—There will be a further question in the case, viz. whether there has been any delivery to Major Bartram; for if not, then the carriage passed to the assignees as a matter of course. He would not be the true owner till delivery. The question is not merely whether the possession of the article leads to a false credit, which was the ground of the original statute, but whether it is not so mixed up with the bankrupt's property, that no person can distinguish the one from the other.

GASELEE, J.—This is a question of law. Upon the construction of the act of Parliament alluded to, I have no

(a) Sect. 72, enacts, that if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or

chattels whereof he was reputed owner, or whereof he had taken upon him the *sale, alteration, or disposition as owner*, the Commissioners shall have power to sell, &c.

hesitation in saying, that, in my opinion, the plaintiff is entitled to recover. The statute alluded to says, that if the true owner of an article allow it to remain in the custody, and subject to the disposition of a bankrupt, he shall suffer for his misconduct. But that does not apply to a case where the article is left for the usual purposes of trade. We all know, and it has been proved in the cause, that it is customary for coachmakers to keep carriages after they are made, and to put them in a front shop for the purpose of display, to shew what kind of carriages they make, and what description of customers they have. Under these circumstances, I am clearly of opinion, that this is not a case within the meaning of the act of Parliament.

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Taddy, Serjt.—Does your Lordship think that there was any delivery.

GASELEE, J.—I think there was a delivery in this way. It seems that the carriage was finished on the 9th of January. The party was then told it was complete, upon which he paid the money, and the maker agreed to keep the carriage, without making any charge, for six months, or longer. I think this was as much a delivery as the nature of the case would admit. It would have answered no purpose to have sent the carriage to the plaintiff's house, and then to have brought it back to remain at the maker's.

Verdict for the plaintiff.

Wilde, Serjt., and *Comyn*, for the plaintiff.

Taddy, Serjt., and *Platt*, for the defendants.

[Attornies—*Pinero*, and *Allen & Co.*]

See the case of *Newport v. Hollings*, post, page 223.

1827.

BEFORE MR. JUSTICE BURROUGH.

Dec. 8th.

PHILLIPS v. CRUTCHLEY.

Evidence that the defendant said to the plaintiff that he would marry her in July, and that he would marry her sooner were it not that he had arrangements to make, which would be completed by July, if not before; and also that he said to her once, in the month of May, on taking leave, "I hope in a few weeks to take you home," is sufficient, in an action for breach of promise of marriage, to support a count on a general promise.

BREACH of promise of marriage.—The declaration contained four counts: two on promises to marry on request; one on a promise to marry within a reasonable time; and one on a promise to marry generally. The defendant said, that he would marry the plaintiff in July. That he would marry her sooner, were it not that he had to make some arrangements, to provide for his sister, who had been keeping his house, which he should be able to do by July, if not before. In the month of May, on taking leave of her once, he said, "I hope in a few weeks to take you home."

Wilde, Serjt., for the defendant, submitted, that neither of the counts was proved. The promise proved was to marry at a specific time, namely, in July, and there was no count to which that proof would apply.

BURROUGH, J.—I think there is sufficient evidence of a general promise.

Verdict for the plaintiff.—Damages, 200*l*.

Taddy, Serjt., and *Tomlinson*, for the plaintiff.

Wilde, and *Andrews*, Serjts., for the defendant.

[Attornies—*Harmer* and *Virgo*].

IN the ensuing Hilary Term, *Wilde*, Serjt., moved for a new trial; but the Court thought the ruling at Nisi Prius right, and refused a rule.

See the case of *Potter v. Deboos*, 1 Stark. 82, cited *ante*, Vol. I, p. 352 (n).

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Adjourned Sittings in London, after Michaelmas Term, 1827.

BEFORE MR. JUSTICE GASELEE,

(Who sat for the Lord Chief Justice.)

HEDGER v. HORTON.

Dec. 10th.

ASSUMPSIT on a bill of exchange, drawn by one Ansell, on, and accepted by the defendant, and indorsed by Ansell to the plaintiff.

Wilde, Serjt., for the defendant, on cross-examination, asked one of the plaintiff's witnesses, whether, in a conversation he admitted to have had with Ansell, at the time he was the holder of the bill, he learned for what consideration the bill had been drawn.

In an action by the first indorsee against the acceptor of a bill of exchange; the declarations of the drawer made before indorsement, shewing that the acceptor received no value for his acceptance, cannot be admitted in evidence, if the drawer be living at the time of the trial, because in such case he might be called as a witness.

Adams, Serjt., for the plaintiff, objected.

GASELEE, J., was inclined to allow the question.

Cross, Serjt., as *Amicus curiæ*, mentioned the case of *Barrough v. White* (a), in which the Court of King's Bench had decided, that such evidence was not admissible.

Adams, Serjt.—We are the holders of the bill, and it is to be presumed, that we are innocent and *bonâ fide* hold-

(a) 6 D. & R. 379. The point decided in that case was, that the right of an innocent indorsee for value to recover upon a promissory note made payable to the payee "or order, with interest, on demand," cannot be impeached by

evidence of declarations, made by the payee, whilst the note was in his hands, and before indorsement, that it was given to him by the maker, without consideration, &c.

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ers for valuable consideration, till the contrary is proved. *Barough v. White* is all fours with this case. Let them shew we are not holders for value, let them impeach our title, and then they may bring in evidence of the declarations of Ansell.

Crowder, on the same side.—The party himself, whose declarations are sought to be given in evidence, might be called as a witness, and this seems to be the principle on which such declarations are inadmissible.

Wilde, Serjt.—The law presumes, when a bill is drawn and accepted, that it is drawn for value received *by the acceptor*; and it is on this ground that a party is not called on to prove the consideration in the first instance, viz. the presumption of law, that consideration has been received *by the defendant*. But the moment the acceptor proves that the bill was drawn under circumstances which shew that no value was given—

GASELEE, J.—I do not think that the case of *Barough v. White*, stands in your way (*b*); but my difficulty is upon that which Mr. *Crowder* has stated, viz. that the party is living and might be called as a witness.

Wilde, Serjt.—We are constantly in the habit of calling bankers' clerks to prove a want of consideration, by conversations between the drawer and acceptor. My friend says, that we are to call Ansell. Why, my case is, that he is the real plaintiff seeking to recover in another's name. I propose to shew, by communications between Ansell (the drawer), and the defendant (the acceptor), that at the time when the bill was in the hands of Ansell, it was not a bill that could be enforced; and I propose to do that by proving Ansell's declarations made against his own interest.

(*b*) See note (*a*) as to the point there decided. Nothing was produced at the trial but the marginal abstract of the case.

GASELEE, J.—I have always understood, that, with respect to real estates, the declarations of a party made before he parted with his interest, have been received in evidence, and not his declarations after. But I believe that this has been in cases where the party was dead (c). In this case, as the party is alive and might be called as a witness, I am of opinion that the evidence cannot be received (d).

Ansell was then called as a witness for the defendant, but failing to establish his case, the

Verdict was for the plaintiff.

Adams, Serjt., and *Crowder*, for the plaintiff.

Wilde, Serjt., and *Hildyard*, for the defendant.

[Attornies—*Spyer*, and *Sigel*.]

(c) Mr. Phillipps in his *Law of Evidence*, Vol. I, p. 259, after speaking of declarations against interest by deceased occupiers of lands, &c. &c., says, "In all the cases which have been mentioned on this subject, the person who made the entry or declaration in question, was deceased at the time of the trial: if the rule were not confined to such cases, there would be great danger of collusion. It has, therefore, been held, that such evidence is not admissible where the person is incapable of attending from illness."

(d) In the case of *Barough v. White*, it was proposed to give in evidence the declarations of a person named Arnett, *Bayley*, J. said, "In no case can the declarations of a party *who is alive, and may be called as a witness*, be received to affect a third person, unless the latter is identified with such declarations. Now in this case there was nothing to identify the plaintiff with Arnett's declarations."

The rest of the Judges expressed opinions to the same effect upon that point.

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Dec. 14th.

DE VAUX and Another *v.* SEWELL.

The clerk of the bails of the Mayor's Court of London, in pursuance of a practice in that Court, refused to accept bail for a defendant, who was sued jointly with another person, unless it was also given for such other person:—Held, that this refusal was no answer to an action against a serjeant at mace, from whose custody that defendant, for whom bail was offered, had escaped.

THE first count of the declaration stated, that one Nathaniel Goldstein, and Alexander Cohan Castle, theretofore, to wit, on the 3rd of October, 1827, at &c., were indebted to the plaintiffs in the sum of 1200*l.*, in respect of certain causes of action before then accrued to them against the said N. G. and A. C. C., within the jurisdiction of the Court thereafter next mentioned; and being so indebted, the plaintiffs, for the recovery of their said debt, afterwards &c., to wit &c., according to the course and practice of his Majesty's Court, before the Mayor and Aldermen of the city of London, in the Chamber of the Guildhall of the same city, duly caused an affidavit of the said debt to be made in the said Court, and thereupon then and there, according to the course and practice of the said Court, duly affirmed their bill original against the said N. G. and A. C. C., for the said debt; and afterwards, to wit, on &c., sued and prosecuted out of his said Majesty's Court, &c. against the said N. G. and A. C. C., according to the course and practice of the said Court, a certain mandate directed to the defendant, then and there being one of the serjeants at mace of the said Court, as such serjeant, or to any other serjeant at mace of the said Court, by which said mandate the said defendant was commanded to arrest the said N. G. and the said A. C. C., at the suit of the plaintiffs, according to the custom of the said Court, which said mandate was then and there duly marked for bail, for 1069*l.* By virtue of which said mandate, defendant so being serjeant, &c., to wit, &c. took and arrested the said N. G. by his body, and then and there had and detained him in his custody as such serjeant, &c. Yet the defendant being serjeant, &c. not regarding &c., without the leave or license, and against the will of the plaintiffs, voluntarily suffered and permitted the said N. G. to escape, &c. The declaration then averred

that the said N. G. did not appear in the said Court of the said Mayor, &c. according to the practice of the said Court, but therein wholly failed, &c., by means of which the plaintiffs had been injured and delayed in the recovery of their debt, and were likely to lose the same, &c.

The second count was for *not taking* Goldstein. There were two other counts, and the plea was—Not guilty.

The plaintiff's demand was made up of five bills of exchange, and a promissory note; but, in the course of the cause, the claim was reduced to the demand on the promissory note alone.

The clerk to the plaintiff's attorney, who was also an attorney of the Mayor's Court, produced the affidavit of debt, and also a book, which he stated to be one in which entries are made of actions commenced in the Mayor's Court. It contained, among others, the following entry: "In the Mayor's Court, London, 3rd October, 1827, Nathaniel Goldstein, and Alexander Cohan Castle, defendants, at the suit of De Vaux and Another, trespass on the case, to the damage of &c., on the oath of," &c. The witness stated that this entry was, according to the practice of the Court, called an original bill. Upon this, a mandate was made out, and delivered to a person named Newsom. It was in the following form:—

"In the Mayor's Court, London.

To Charles Sewell, one of the serjeants at mace, or to any other serjeant at mace of the same Court.	} By the Mayor, &c.
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Arrest Nathaniel Goldstein, and Alexander Cohan Castle, defend- ants, at the suit of Charles De Vaux and Adolphus Debraux, plaintiffs.	} Case, 2000l. Sworn, 1069l. and upwards.
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Tho. N. Williams, plaintiffs' attorney:

Lord Mayor's Court-office,

3rd October, 1827."

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It appeared that there were six serjeants at mace, but the defendant was the only one who had attended for two years previous. On this mandate Goldstein was arrested, and taken to a lock-up-house, kept by a person named Walbanke; and it was proved to have been the practice, for a period of thirty years, for the serjeants at mace of the Mayor's Court, to take their prisoners to a lock-up-house, having no place of custody of their own. It was from Walbanke's house that Goldstein escaped. Bail was offered for him, but the clerk of the bails refused to accept it unless the parties would become bail also for Castle, who was sued with him; and it appeared to have been the practice of the Mayor's Court, to require bail to be given in that manner. It also appeared that a petition had, shortly before the arrest in question, been presented to the Court of Aldermen, by the six serjeants at mace, praying for the appointment of an assistant, and that in consequence the Court had appointed Mr. Newsom. A bill of charges had been made out in the name of the defendant. It was proved that the defendant, on being told that the action might be discontinued if he would re-take Goldstein, said, that he did not think he could, but he knew his own business best, and should act as he thought proper. It appeared that Goldstein offered to pay 10*s.* in the pound, and to give good bills; and it appeared also, that he had since become bankrupt.

Wilde, Serjt., for the defendant, submitted, that as Newsom was a regular officer properly appointed by the Court, he was responsible, as the warrant was delivered to him. He also contended, that the refusal of the clerk of the bails to take bail for Goldstein alone, was a discharge of the defendant; and further, that the plaintiffs had not made out any loss, as it did not appear that they would have obtained their money, if Goldstein had continued in custody.

Taddy, Serjt., for the plaintiffs, contended, that the defendant, as the officer of the Court employed to arrest Goldstein, having once got possession of his person, could only permit his discharge in the event of good bail being put in; and also, with respect to the damages, that the offer of Goldstein to give bills, and pay 10*s.* in the pound, was satisfactory evidence of the loss which the plaintiffs had sustained.

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GASELEE, J.—The first question is, was Newsom acting as the deputy of the defendant? There is nothing in law against it; nor is it at all inconsistent. The petition to the Court was for the appointment of a deputy; and it seems that Newsom holds only during pleasure. I think that the defendant has not discharged his duty. Lock-up houses are not known to the law. An officer who is employed to arrest a party, does not do his duty by merely leaving him in custody in a lock-up house. It is said, that bail was offered and refused. I will not pronounce a decided opinion upon the subject; but I am inclined to think that the officer of the Court was not justified in refusing it. But I am clearly of opinion that his refusal is no answer to this action. You are bound to hold the officers to their duty. This, however, is not a gross case, as many cases of escape are. The act of the defendant is as venial as such an act can be. The plaintiffs could not declare till the other defendant, Castle, was in Court. They could not have got their judgment against Goldstein alone. But it seems that Goldstein offered to pay 10*s.* in the pound. It is for you to say what damage the plaintiffs have sustained; for, provided you are of opinion that Newsom was only an agent, I think, that, in point of law, this action may be maintained.

Verdict for the plaintiffs—Damages, 40*s.*

Taddy and *Andrews*, Serjts., and *Chitty*, for the plaintiffs.

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Wilde and Jones, Serjts., and Bolland, for the defendant.

[Attornies—*T. N. Williams, and E. Isaacs.*]

IN the ensuing Hilary Term, *Wilde*, Serjt., moved for a new trial, and contended, that as the non-appearance of Goldstein was not the result of the negligence of the defendant, but produced by the fault of the clerk of the bails, the action could not be maintained.

The Court said, that it was the duty of the officer employed to make an arrest, to take care that the party was forthcoming, and that the plaintiff was not bound to look to any one except the officer. They also were of opinion, that, under the circumstances of the case, the Jury were perfectly right in giving only nominal damages.

Rule refused.

Dec. 17th.

BENSON v. HIPPIUS.

If the party employed by the consignee of a ship's cargo to sell it, undertake that he will "pay freight and primage, and demurrage, if any be due," and in every respect put himself in the place of the charterer, he will be liable, in an action by the owner, to pay damages for any delay in discharging the cargo beyond the number of days allowed for demurrage in the charter-party.

ASSUMPSIT on an agreement. The *second* count of the declaration stated, that a charter-party had been entered into between the plaintiff, as the owner of the ship *Trusty*, and one *Bennett Thomas Gillam*, merchant, whereby it was agreed that the said ship should, with all convenient speed, proceed to *Quebec*, and there load, from the factor of the said merchant, a full cargo of square masts, &c., and, being so loaded, should proceed to *London* and deliver the same, on being paid freight, as in the said charter-party mentioned; and that the freight should be paid on unloading and right delivery of the cargo, &c.; and that fifty running days should be allowed the said merchant (if the ship was not sooner despatched) for loading at *Quebec*, and unloading at *London*, and ten days on demurrage, over and above the said laying days, at 10*l.* per day, &c.; and

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that the ship should discharge in the Docks, if required by the freighter. It then averred that the ship loaded at Quebec, and proceeded to London, and was required to discharge in the Docks, and was ready to deliver, and that certain persons using the name and firm of *John Pirie & Co.*, to whom the cargo was consigned, *had requested* the defendant to sell the same for them; whereupon, afterwards, &c., *in consideration that the plaintiff*, at the request of the defendant, *would deliver to him the cargo*, according to the terms of the charter-party, *the defendant promised the plaintiff* to pay him the freight and primeage, and demurrage, *if any demurrage should be due, and in every respect to put himself in the place of the said B. T. Gillam*, the charterer of the said ship, so far as respected the agreement with the plaintiff for the said voyage. It then averred that the defendant requested the plaintiff to discharge the cargo in the Docks; and that he, confiding in the defendant's promise, did afterwards do so; and that the ship was kept and detained in the loading at Quebec, and the unloading in London, for the space of fifty days beyond the fifty days mentioned in the charter-party, whereby a large sum of money, to wit, the sum of 100*l.* for ten of the said days over and above the said fifty running days, being at and after the rate of 10*l.* *per* day, became due from the defendant to the plaintiff, according to the terms of the charter-party, and the effect of the defendant's undertaking. It then proceeded—And the said plaintiff, for the detention for forty days, residue of said fifty days, and for being deprived of the use of the ship, &c., during the said forty days, reasonably deserved to have of the defendant, and the said defendant, according to his undertaking, became liable to pay, a certain large sum, to wit, the sum of 400*l.*, &c. There were other counts: and the plea was—The general issue.

By the charter-party, which was dated March 18th, 1825, and signed by Gillam and the plaintiff, fifty running days were to be allowed for loading and unloading, and

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ten days on demurrage over and above the said laying days, at 10*l.* *per* day.

The agreement signed by the defendant was in the following terms:—

“ Mr. Thomas Benson,

Sir,—Messrs. John Pirie & Co., the consignees of your ship Trusty's cargo, having placed it in my hands for sale, I hereby engage to pay you the freight and primage (and demurrage, if any be due), and in every respect to put myself in the place of Mr. Gillam, the charterer, so far as respects the agreement for the said Quebec voyage. I am, &c.

C. J. Hippius.”

The ship had been detained at Quebec and in London about thirty-five days beyond the fifty running days. The master of the ship was called as a witness, and proved that the delay did not arise from any fault of his, but that such part of it as occurred at Quebec arose from the circumstance of the cargo's not being ready, and such part of it as occurred in London, from the crowded state of the Docks. The ship had not begun to unload at the time when the defendant's agreement was signed. The bill of lading to Messrs. Pirie & Co., the consignees, only provided for the payment of freight: 100*l.* had been paid into Court.

Wilde, Serjt., for the plaintiff.—It has been several times determined, that where there is one period for running days, and another period for demurrage, from whatever cause any delay arises, the ship must be restored to the owner, fit for further use; and if it is not, he is entitled to damages. And in this case, as the plaintiff by his agreement has put himself in the place of the charterer, he will be bound to pay such damages himself.

Taddy, Serjt., for the defendant, (to the Jury).—I admit that, as between Gillam and the plaintiff, the original parties to the charter-party, if the delay arose from the

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state of the Docks, without any fault of the master, the charterer may be liable, provided there be an express covenant, as in the cases alluded to. But those cases have been decided upon the nature of the covenant, which might have contained an exception, if the party had pleased to insert it. But this is not a question between the plaintiff and Gillam, but between him and a third person, under peculiar circumstances. Pirie & Co., the consignees, contract merely to pay freight, and not demurrage. We have paid into Court enough to cover what is properly demurrage, which is that provided for in the charter-party, *viz.* ten days at 10*l.* *per* day. The contract is dated September 21st, at which time the ship had not begun to unload, and when it was not known what delay might arise. It will be for his Lordship to say, on the words "*if any be due*," whether it means any more than that which was due at that time. I submit, *first*, that there is no sufficient consideration between the plaintiff and defendant apparent on the face of the contract; and *secondly*, if there is, it is not properly stated in the declaration, because, there it is said, "in consideration that they *would* deliver," and the agreement is, Messrs. Pirie & Co. *having* delivered. The undertaking is for demurrage; and that does not extend to the contingent damages for future detention, but is merely for the demurrage due at the time of signing.

GASELEE, J.—The undertaking does not refer to the bill of lading. I consider the words "in every respect," &c., make the defendant liable for all that Gillam was. I am of opinion that the plaintiff is entitled to a verdict, but I will give you leave to move to enter a nonsuit.

Verdict for the plaintiff, 300*l.*

Wilde, Serjt., and Holroyd, for the plaintiff.

Taddy, Serjt., and Platt, for the defendant.

[Attornies—Chapman, and Reardon & D.]

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In the ensuing Hilary Term, *Taddy*, Serjt., moved, pursuant to the leave given at the trial. The cases of *Wain v. Warlters* (a), and *Saunders v. Wakefield* (b), decide, that there must be a consideration moving from the plaintiff to the defendant, and in this case there is none. The words of the agreement are, "your ship *Trusty's cargo*." In the case of an implied contract between the owner and the charterer, the crowded state of the Docks would be a circumstance from which the Jury might infer what was the intention of the parties; although it would not be so in the case of an express covenant; *a fortiori* should that circumstance be taken into account in the case of a third person. Demurrage, in the sense alluded to, is for ten days' demurrage only, according to the terms of the charter-party, and not for contingent damages for delay beyond that period.

The Court expressed their opinion, that the verdict was right on the second count: and therefore they

Refused a rule.

(a) 5 East, 10.

12 East, 179; *Rodgers v. Forresters*, 2 Camp. 483, and *Burmester*

(b) 4 B. & A., 595.

v. Hodgson, 2 Camp. 488.

See the cases of *Lèer v. Yates*,
 3 Taunt. 387; *Randall v. Lynch*,

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FANSHAWE, Clerk, v. HEARD.

If a declaration aver, that in pursuance of an agreement, an action was discontinued, evidence that, since the agreement, no steps had been taken in the cause, is not sufficient to support the allegation.

ASSUMPSIT on an agreement, by which the defendant undertook to pay certain costs, in consideration that the plaintiff would discontinue an action which he had commenced against him.

The declaration averred that the action had been discontinued.

The only evidence given was, that no further proceedings had, since the agreement, been taken in the cause.

Storks, Serjt., submitted, that this was not proof of a discontinuance.

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Taddy, Serjt., contended, that as the witness said, that no further proceedings had been taken, it was quite sufficient.

BURROUGH, J.—Here is an action depending, and there is a known way of discontinuing actions, which has not been adopted in this case; I think the plaintiff must be nonsuited, but I will give you leave to move.

Taddy, Serjt., then proposed to go on the account stated, and produced a letter written by the defendant's attorney, stating that it was hardly worth while to tax the bill, but that there would be a sum to be taken off, which would leave 11*l.* 12*s.* remaining, which sum the defendant was "ready and willing to pay."

Storks, Serjt.—This letter refers to the agreement, and does not dispense with any conditions to be performed on the part of the plaintiff; it is merely written on the supposition that all the proper steps would be taken; it assumes the agreement as its basis.

BURROUGH, J.—Thought that the letter was not sufficient.

Nonsuit, with leave to move.

Taddy, Serjt., and *Erle*, for the plaintiff.

Storks, Serjt., for the defendant.

[Attornies—*Keene* and *Jones*.]

IN the ensuing Hilary Term, *Taddy*, Serjt., moved to set aside the nonsuit, but the Court refused a rule.

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PETER GODEFROY v. JAY, and Another.

In an action against attornies for negligence in not making a motion to set aside proceedings for irregularity, if the declaration aver, as the consequence of the neglect, a judgment by default and further proceedings and final judgment and execution, an examined copy of the record must be given in evidence, to prove both the judgments; and it is not enough to produce entries in the Prothonotary's book, and the inquisition, with the Prothonotary's *allocatur*.

Seemle, that, in such a case, the judgments are of the gist of the action, and not merely special damage.

Seemle also, that a writ intended for the father, served upon the son, who answers to the name of the father, that being his own name also, is sufficiently served, if it come to the hands of the father before its return.

THE first count in the declaration stated, that before the time, &c. a certain notice in writing was delivered to, and served upon him the said Peter, stating in substance, and to the effect, that a declaration was filed with the Prothonotaries of the Court of Common Pleas against him, at the suit of one Stephen Dubois, &c. That he the said Peter had *never been served with any writ or process, or copy of any writ or process* issuing out of the said Court, against him at the suit of the said Stephen Dubois, nor had he been arrested, &c. That he thereupon applied to the defendants, who were then and there attornies at law, &c., and delivered to them the said notice, and retained and employed them as his attornies to take the necessary and proper steps in the premises, and that in consideration of such retainer, &c., the defendants undertook faithfully to discharge their duty, &c. It then proceeded as follows: "And the said Peter in fact says, that it afterwards became and was the duty of the said defendants, as the attornies of and for him the said Peter in the premises, to have applied or caused application to be made to the said Court of our said lord the King of the Bench, in due time, to have the proceedings in the said action, at the suit of the said Stephen Dubois, against him the said Peter, set aside, by reason and on the grounds, that he the said Peter had never been served with any writ or process, or copy of writ or process at the suit of the said S. D. issuing out of this Court, nor had been arrested at the suit of the said S. D. by virtue of any writ or process issuing out of the said Court, against him the said Peter, whereof the defendants had notice. Yet they, not regarding their duty in that behalf, but contriving and intending to injure the said Peter, *did not make or cause to be made application* to the said Court of our said lord the King of the Bench here, in due time, for the purpose aforesaid, or take any

other proper steps in the premises, as the attorneys of and for the said Peter, but wholly neglected and omitted so to do; *by reason and in consequence whereof*, and by and through the neglect and default of the defendants in that behalf, afterwards, to wit, on the 18th day of April, in the year 1826, to wit, at &c. *judgment by default was signed against him the said Peter* in the said action, and such further proceedings were had in the said action, that afterwards, to wit, in Easter Term, in the seventh year of the reign of our lord the now King, *it was considered and adjudged in and by the said Court of our said Lord the King of the Bench here, that the said S. Dubois should recover against the said Peter a large sum of money, to wit, the sum of 31l. 5s.; and execution was afterwards, to wit, on the 9th day of May, in the year last aforesaid, to wit, at &c., issued upon the said judgment*, and he the said Peter, in order to satisfy the said execution, was forced and obliged to pay, and afterwards, &c. did pay to the said S. Dubois *the money so recovered* as aforesaid, and another large sum of money, to wit, the sum of 5l., the costs and expences of, and occasioned by, the said execution, and has also been greatly injured in his credit," &c. There were other counts in the declaration, but they all averred a judgment by default,—further proceedings,—final judgment,—execution, and payment, in the same form as they were averred in the first count.

The defendants pleaded the general issue.

A witness was called, who stated, that, in Hilary Term, 1826, he went to the office of the defendants, accompanied by the plaintiff's son, and took them a notice of declaration, which had been served upon the plaintiff in an action at the suit of Dubois; and at the same time told them that the copy of the writ had been served on the plaintiff's son, and not on himself; and requested them to move the Court to set aside the proceedings; which they promised to do; that he called several times afterwards, and was told that a brief had been delivered, and a motion

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made, but that no rule was drawn up, as the brief could not be found in the hands of the officer of the Court, or of the serjeant, to whom it had been given.

The witness admitted, that, in the month of October, 1825, very shortly after the service of the writ upon the son, he had a conversation with the father, in which he acknowledged that he knew what the action was for, and that his son had been served, as he supposed, instead of himself, in consequence of his opening the door, and answering the party inquiring, that his name was Peter Godefroy. A book was produced from the Prothonotaries' Office of the Common Pleas, which the clerk, who produced it, said, was the book in which they entered all judgments by default. The entry was thus: in the margin was L. for London, then came the name of the cause, *Dubois v. Godefroy*, then a private mark or letter, and the figures 10 carried out. The inquisition was put in, with the Prothonotary's *allocatur* of the costs; but it appeared that the roll had not been carried in.

Wille, Serjt., for the defendant, submitted, that the evidence offered of the judgment by default was not the best evidence, as interlocutory judgment is just as much signed as final judgment is, and should be proved in the same way, by the production of the record, or an examined copy of it. He also contended, that evidence should be given of the final judgment.

Comyn.—These are not allegations necessary to be proved, they merely go to the consequential *damage*, and not to the *gist* of the action. The *gist* is the *negligence*.

Wilde, Serjt.—There is no cause of action independent of the consequences of the omission complained of. No cause of action arises from the not setting aside an informal service of a writ, if no proceedings followed in the action in which that service took place. With respect to the judgment by default, the entry in the book does not at

all satisfy the allegation in the declaration; it merely contains the county, the names of the parties, and the fee received in the office, or to be accounted for by it; what was the nature of the judgment does not in any way appear.

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BURROUGH, J.—I am clearly of opinion that the plaintiff cannot get on, he has no evidence of the judgment.

Taddy, Serjt.—The writ recites the judgment.

BURROUGH, J.—I think it will not do. There is no injury sustained without the judgment.

Comyn.—The execution is an injury.

BURROUGH, J.—But the execution is upon the judgment.

Comyn.—That part of the declaration is merely a statement of special damage.

BURROUGH, J.—I think it goes to the whole. There is no pretence for this action. With respect to the technical objection there is nothing at all in it. The son received the writ for the father, and the father was aware of the service long before the writ was returnable. The application could not have been successful, if it had been brought before the Court. I am of opinion that the plaintiff must be called.

Nonsuit.

Taddy, Serjt., and *Comyn*, for the plaintiff.

Wilde, Serjt., and *Tomlinson*, for the defendants.

[Attornies—*Dalton*, and *Jay & A.*]

IN the ensuing Hilary Term, *Taddy*, Serjt., moved for a new trial; but the Court were of opinion, that, as the

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plaintiff in the original action might have been compelled to make up the record, an examined copy of such record was the proper evidence in proof of both the judgments, and therefore

Refused the rule.

On the question, whether, in an action against an attorney for negligence, it is necessary to prove that the plaintiff had a good cause of action against the original defendant, see the cases of *Lee v. Ayrton*, one, &c. Peake N. P. C. 161; *Russell v. Palmer*, 2 Wils. 325; *Pitt v. Yalden*, 4 Burr. 2060; *Gunter v. Cleyton*, 2 Lev. 85; and *Alexander v. Macauley*, 4 T. R. 611. With regard to the service of non-bailable process, Mr. Justice Hayley says, (*Thomas v. Pearce*, 4 D. & R. 317), "The rule to be collected from the cases is, that the person serving the copy of a writ, is not bound to shew the original, unless it is demanded; but if it is demanded, it must be shewn." But, however,

the demand need not be at the very time of the service; for in the case of *Westley v. Jones*, 5 Moore, 162, where the party was served with a copy of a *capias*, and in a quarter of an hour afterwards demanded to see the original, which was refused by the officer, it was held, that, as the sight of the original was demanded, and that demand was not complied with, the service was irregular. An admission by the tenant in possession, that he has received the declaration in ejectment, before the *essoign* day, is sufficient proof of service, though it was in fact not served personally on him or his wife. *Roe dem. Hambrook v. Doe*, 14 Ea. 441.

Dec. 19th.

HAYTHORN and Another v. LAWSON.

In a joint action for a libel by two partners, damages cannot be given for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business.

ACTION for a libel on the plaintiffs as bankers, and co-partners at Bristol.

Wilde, Serjt., for the defendants, in allusion to some remarks made by *Taddy*, Serjt., observed.—No damages can be given for any injury to the private feelings of the two plaintiffs. The joint action is only maintainable for injury to that in which the plaintiffs have a joint interest.

GASELEE, J.—In an action for false imprisonment brought by two persons jointly, it was held, that the ac-

tion would lie for money which they had jointly paid in order to procure their enlargement; but that damages could not be given for the particular injury and inconvenience which they had personally suffered in their individual capacity. And the principle on which that case was decided, is applicable to the circumstances of this. The plaintiffs, therefore, can only recover damages for the injury which they have sustained in their joint trade as bankers.

Verdict for the plaintiffs, for nominal damages.

Taddy, and *Merewether*, Serjts., and *George*, for the plaintiffs.

Wilde, Serjt., and *Platt*, for the defendant.

[Attornies—*Philpot & S.*, and *Platt*.]

See the note to the case of *Goldstein v. Foss*, Vol. 2, p. 253 of these Reports, and the cases there mentioned.

BEFORE MR. JUSTICE PARK.

MOTT v. MILLS and Others.

Dec. 22nd.

TROVER for deeds, &c. brought by a bankrupt against his assignees, to try the validity of his commission. The conversion was admitted.

Bosanquet, Serjt., for the defendants.—The plaintiff is not in a situation to take any objection to the validity of his commission, because he has appeared to it; and when certain creditors, by whom he was detained in custody, came to prove their debts, he applied for and obtained his discharge out of custody. In the case of *Goldie*

Semble, that under the provisions of the new bankrupt act, 6 Geo. 4, c. 16, s. 59, a bankrupt in custody, by insisting on his discharge, previous to proof of a debt, does not estop himself from disputing the validity of the commission against him.

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v. Gunston & Others (a), which was an action similar to the present, Lord *Ellenborough* says, "I think the plaintiff, having taken the benefit of the commission in procuring his discharge under it, is precluded from contesting its validity in a Court of law" (b). And in the case of *Watson v. Wace* (c), Lord *Tenterden*, at Nisi Prius, took the same course which was taken by Lord *Ellenborough*, and nonsuited the plaintiff; and, on application to the Court of King's Bench, the nonsuit was confirmed. In the present case, application was made to the Commissioners and not to the Court of King's Bench; but that, I submit, does not make any difference. The new bankrupt act allows that to be done by the Commissioners, which was previously done by summons before a judge. The Commissioners would have expunged the debt, if the authority had not been given for the discharge, and accordingly it was given. The right is precisely the same under the new act, as under the act of the 49th of Geo. 3. It is not necessary that the bankrupt should claim the benefit of a certificate; but it is enough if he claims the benefit of his discharge. The principle I take to be this: If you say that the proceeding against you is wrong, then you must remain in custody; but if you take the benefit of a discharge under that proceeding, then it must be considered as an admission that the proceeding is right.

The learned Serjeant then proved, by the books kept by the clerk of the papers at the King's Bench Prison, that the plaintiff was in custody at the suit of a person named Wood, in the month of January, 1827, and that

(a) 4 Camp. 381.

(b) His Lordship added—"I conceive he may still apply to the Great Seal to have it superseded; but I cannot hear him say that he has not been lawfully adjudged a bankrupt, after he has declared that he was so lawfully adjudged,

and on that ground obtained his discharge from several actions brought against him. The mere surrender to the commission, I think, would not be enough," &c.

(c) 5 B. & C. 153, reported also in 7 D. & R. 633, and Vol. 2 of these Reports, p. 171.

he was discharged as to that action on the 25th July, 1827. He then called the attorney to the commission, who stated that he was at Guildhall at the meeting for the choice of assignees, on the 20th of July; that the plaintiff was there; and on Wood's applying to prove his debt, the plaintiff said, "Mr. Wood, you must give me my discharge before you prove your debt." The plaintiff also complained that two creditors, named Frances and White, had previously proved, without giving him a discharge, and the Commissioners directed the witness to expunge the debt, if the discharge was not given. It appeared that the plaintiff told the Commissioners that it was his intention to dispute the commission, on the ground that he was not a trader.

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Taddy, Serjt., for the plaintiff.—This does not prejudice the plaintiff, nor prevent his bringing this action. The new bankrupt act differs from the old, as to the discharge out of custody. Under the old acts the bankrupt was to make his election, and if he applied to be discharged, he was asking for a benefit and favour under the commission; but the new statute makes the discharge a *condition precedent* to the proof of the debt. The act of Parliament says (a), that no creditor, who has brought any

(a) 6 Geo. 4, c. 16, s. 59. This section enacts—"That no creditor, who has brought any action, or instituted any suit against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission, against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit; and in case such bankrupt shall be in prison or custody

at the suit of or detained by such creditor, he shall not prove or claim as aforesaid, without giving a sufficient authority in writing for the discharge of such bankrupt; and the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved or claimed: Provided that such creditor shall not be liable to the payment to such bankrupt or his assignees, of the costs of such ac-

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action against a bankrupt, shall prove a debt under his commission, without relinquishing his action; and in case the bankrupt shall be in custody at the suit of such creditor, *he shall not prove* without giving a sufficient authority in writing for his discharge. The bankrupt in this case, therefore, merely reminded the Commissioners of what ought to be done under the act of Parliament. He requires no favour; but merely refers to the provisions of the act. The cases cited went upon the ground, that a man should not be allowed to do an inconsistent act. This is not an inconsistent act, any more than the act of surrendering is. Under the old acts, the discharge is to be applied for by the bankrupt; under the new, it is a thing that must be done by the creditor, as a qualification for proving his debt.

Wilde, Serjt., on the same side.—If your Lordship adverts to the form of the surrender, it is much stronger than the present act relied on.

PARK, J.—The answer to that is, that it has been held that the surrendering is not a bar.

Wilde, Serjt.—The use I make of it is this: Both the

tion or suit so relinquished by him; and that where any such creditor shall have brought any action or suit against such bankrupt, jointly with any other person or persons, his relinquishing such action or suit against the bankrupt shall not affect such action or suit against such other person or persons: Provided also, that any creditor who shall have so elected to prove or claim as aforesaid, if the commission be afterwards superseded, may proceed in the action as if he had not so elected, and in

bailable actions shall be at liberty to arrest the defendant *de novo*, if he has not put in bail below, or perfected bail above, or if the defendant has put in or perfected such bail, to have recourse against such bail, by requiring the bail below to put in and perfect bail above within the first eight days in Term, after notice in the London Gazette of the superseding such commission, and by suing the bail upon their recognizance, if the condition thereof is broken."

surrender and the discharge are acts done in the regular prosecution of the commission; and upon the same principle they are both equally inconclusive. The argument is strongest as to the discharge, because it is in favour of liberty. This is a question of *quo animo*. A bankrupt has two months in which to dispute his commission. Is he bound to wait till the end of that time? The plaintiff petitioned, and, as far as intention goes, his petitioning was notice that he did not acquiesce in the validity of the commission.

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PARK, J.—I have considerable doubt upon this subject. All the cases cited were before the present act. I wish not to decide this question at *Nisi Prius*; but I will give my brother *Bosanquet* leave to move to enter a nonsuit.

Bosanquet, Serjt.—The ground of the argument on the other side is, that the bankrupt, in the former cases, came to receive a benefit, and that in this case it is not so. But in this respect the old acts and the present are precisely the same; for the creditor, if he proves, is to relinquish his action.

PARK, J.—Suppose the solicitor to the commission had known the fact, and had said to the Commissioners, "this man is in custody," would not the Commissioners themselves have said to the creditor, you must discharge the man before you can prove your debt; but it is too delicate for me to take upon myself the proper construction of the act of Parliament upon this point. You shall have leave to move to enter a nonsuit.

The case then proceeded, and when it was going to the Jury, upon the question of whether he had been proved to be a trader, the plaintiff elected to be

Nonsuited (a).

(a) In consequence of this, it Court upon the point reserved; became unnecessary to move the but as the present is the first oc-

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*Taddy and Wilde, Serjts., and Hill, for the plaintiff.**Bosanquet and Andrews, Serjts., for the defendants.*[Attornies—*Robinson, and Palmer & France.*]

casion on which the question has been raised, the inclination of the learned Judge's opinion appears to us of importance, and therefore

we have thought it right to insert the case, though it is not to be considered as an express decision on the subject.

1828.

Jan. 17th.

BATTY and Others v. M'CUNDIE, BALDEY, and Others.

If one of several partners be concerned in preparing the prospectus of a projected Newspaper, which prospectus states, that he and others will act as treasurers and managers, and also that the subscribers are not to be partners, nor to be answerable for more than their subscription; and be also aware, that a particular individual is to be sole nominal proprietor; the firm of which such partner is a member, (although he has not taken any share in the paper), cannot sue the subscribers who have taken shares, for the price of goods furnished for the paper.

ASSUMPSIT for goods sold and delivered. The plaintiffs were stationers; and the action was brought for the price of stamps and paper, furnished for a Newspaper, called *The London Free Press*. It appeared that all the defendants had taken shares in the paper; but that they had so done in consequence of a prospectus, which Col. Jones, one of the plaintiffs, was concerned in preparing; and which stated, that the subscribers were not to be partners, and were not to be liable for more than their subscription. At the bottom of the prospectus was the following note, "Col. Jones, of No. 7, Upper Gloucester Street, Dorset Square, and two other gentlemen, will act as treasurers and managers." Col. Jones had not taken any shares. A person named Low was stated to be entered at the Stamp Office, as sole proprietor of the paper; and, to prove this, a certified copy of the affidavit, made in pursuance of the statute 38 Geo. 3, c. 78 (a), was offered in evidence.

(a) By this act, it is declared to be illegal for any person to print or publish a Newspaper, until an affidavit or affirmation, signed by the party making it, specifying the names, &c. of every person in-

tended to be printer or publisher, as well as of the proprietors, &c., shall have been delivered to the Commissioners of Stamps, or some officer appointed by them.

Russell, Serjt., objected, that the certified copy was not admissible, it being only made evidence by the statute against the party signing and swearing the affidavit, and the persons mentioned as proprietors in it (a).

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Park, J.—I am inclined to admit this affidavit; I do not go on the act of Parliament, though I am not sure that the words are not sufficiently comprehensive, if it were necessary to rely on them. The ground on which I decide is, that it is quite clear that Col. Jones must have known, as a person connected with the management of a newspaper (for every man must be supposed to know the law on the subject of his particular occupation), that it was absolutely necessary to have this affidavit made before the paper could be published; and it seems that, in point of fact, it was made the day before the first publication of the paper.

It was proved that Col. Jones, and the other gentlemen referred to in the note to the prospectus, did actually support the paper according to their undertaking; that before Low had been appointed as nominal proprietor, it had been proposed that a person named Miller should take a variety of shares for persons whose names were not to appear; that, under this first arrangement Col. Jones was to have taken shares, and that he knew that Low was to be the sole nominal proprietor.

Wilde, Serjt., for the defendant Baldey, submitted, that as he and the rest of the parties concerned in supporting the paper could not have recovered any of the profits of it, after holding out Low to the world as the sole proprietor, so neither were they liable to answer generally for the paper; and that Col. Jones, knowing that this was the case, was bound by the arrangement, and was not in a situation to sue.

Spankie, Serjt., for the other defendants.—It will be a

(a) S. 9. See also sect. 14, as to the mode of proving the certificate.

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question in this case, whether Low was not to be a trustee for all the unnamed proprietors (Col. Jones among the rest), as Miller was to have been under the arrangement previously proposed. Col. Jones, by the prospectus, has invited and induced these defendants to take shares, on the understanding that they were not to be responsible; and, under these circumstances, he cannot maintain this action against them.

PARK, J., (in summing up) said, the question is, whether Col. Jones, having a knowledge of all the circumstances, can maintain the action; for it is clear that his knowledge is the knowledge of all the plaintiffs. There is no doubt that the defendants were proprietors; but that will not make them partners. The question is, whether Col. Jones did not know that these persons, though called proprietors, were not to be deemed partners, and whether he did not give them an assurance that they would not be liable for more than their subscriptions. The prospectus states, that the subscribers are not to be partners; and it is proved, that he knew of that prospectus, and acted as treasurer under it. How can he, after this, say that the defendants are liable? The question for your consideration is, whether Col. Jones does not accede to the proposition, that the defendants are not liable, and undertake that he will not look to them as responsible. If you believe the evidence, in the view that I have taken of it, I tell you, that, in point of law, the plaintiffs are not entitled to recover.

Verdict for the defendants (a).

(a) In the course of the cause, *Park, J.*, inquired of Mr. *Knapp*, the Associate, if the defendants appeared by different attorneys. Mr. *Knapp* replied, that there were separate attorneys, and also separate issues. His Lordship in-

timated, that, notwithstanding the separate issues, if the defendants had appeared by one attorney, he should not have suffered more than one counsel to address the Jury for them.

Russell, Serjt., and *Patteson*, for the plaintiffs.

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Wilde and *Jones*, Serjts., for the defendant, *Baldey*.

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Spankie, Serjt., and *Busby*, for the other defendants.

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[Attornies—*Parton*, and *Dobie*,—*Elkins & Son*.]

BEFORE MR. JUSTICE BURROUGH.

GREGORY v. HARMAN and Another.

Jan.

ASSUMPSIT.—The declaration contained a special count, the usual money counts, an account stated, and a count for interest. The plaintiff was one of the residuary legatees, under the will of a person named Patrick, and the defendants were executors of that will, and the action was brought to recover a sum of 3310*l.*, with interest, which the plaintiff claimed under the will. An account of the residue had been signed by all the parties interested. The last item in the account was of the date of the 3d of March, 1821, and it appeared that, in the same month, a commission of bankrupt was issued against the plaintiff, which commission, however, was finally superseded on the 15th of August, 1827. The other legatees had been paid their proportions of the residue.

Where an account of the residuary estate of a testator has been made out by the executors, and signed by the parties interested, under which account all of them have been paid except one, such one may recover his proportion, with interest, in *assumpsit*, against the executors.

Taddy, Serjt., for the defendants, submitted that the action was not maintainable. The account is an account of the residue rendered to the parties, who are residuary legatees, and money had and received cannot be maintained in such a case. In *Deekes & Wife v. Strutt* (a), Lord *Kenyon* says, "I believe that no action, till lately, (except one in the time of the Commonwealth), for a legacy, has been supported in a Court of law. The arguments which have of late years been advanced in support of this action, are founded on the supposed justice of

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the case, and the convenience of the parties; but when it is considered in what manner a Court of equity interposes in suits for legacies, in taking care that provision is made for the different parties entitled, and what inconvenience, and even ruin, to private families, would have ensued from determining that an action can be brought in a Court of law for a legacy, I think that those who have wished to support the action in a common law Court, would hesitate before they came to the conclusion that the action can be maintained," &c.

BURROUGH, J.—I will reserve the point.

Taddy, Serjt., then put in two notices, which had been sent to the defendants. The first was dated 21st August, 1827, from Messrs. Bicknell & Roberts, stating their intention to issue another commission against the plaintiff, and requiring them to hold the money till the rights of the assignees should be ascertained. The second notice was from the same parties, and was dated the 3d September, 1827. It stated that the plaintiff had been arrested at the suit of Messrs. Parker & Walsh, and cautioned the defendants against paying the plaintiff while he was in custody, as he might commit an act of bankruptcy.

It was then proved that the defendants had been Exchange-bill brokers, who had retired from business about six or seven years, and that they had retained the money in their own hands.

Taddy, Serjt., then submitted, that interest could not be recovered.

BURROUGH, J., (in summing up), said—There is no doubt but that the action will lie. There has been an account signed, and the other legatees have been paid; and it is no longer after this to be deemed a part of the residuary estate, but as so much money for the plaintiff

in the hands of the defendants. I remember the case cited; but the facts of this case go beyond it. With respect to interest, I think, on these facts, that it is quite clear that interest ought to be paid; but the rate of payment is a matter for your consideration. It seems that the defendants mixed the money with their own, and you will say what, in the common course of business, they were likely to make of it.

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 GREGORY
 v.
 HARMAN.

Verdict for the plaintiff, for the principal sum,
 and interest at 5 *per cent.*, subject, &c.

Wilde, Serjt., and *R. V. Richards*, for the plaintiff.

Taddy, Serjt., and *Comyn*, for the defendants.

[Attornies—*Vansandau*, and *Fuller & S.*]

IN the ensuing Hilary Term *Taddy*, Serjt., moved, pursuant to the leave given at the trial; but the Court

Refused a rule.

See the cases of *Davis v. Wright*, 1 Vent. 120; *Smith v. Johns*, Cro. Jac. 257; and *Atkins v. Hill*, Cowp. 288.

PROMOTIONS.

IN Trinity vacation, 1827, Sir *Anthony Hart*, Vice Chancellor, was appointed Lord Chancellor of Ireland, vice Lord *Manners* resigned; and *Lancelot Shadwell*, Esq. one of his Majesty's counsel learned in the law, was appointed Vice Chancellor, vice Sir *Anthony Hart*.

In Hilary Term, 1828, Sir *C. Wetherell*, Knt., was re-appointed his Majesty's Attorney-General, vice Sir *J. Scarlett*, Knt., resigned.

OXFORD SUMMER CIRCUIT.

1827.

BEFORE MR. JUSTICE LITLEDALE AND MR. BARON VAUGHAN.

STAFFORD ASSIZES.

BEFORE MR. JUSTICE LITLEDALE.

1827.

Aug. 9th.

ATTWOOD v. SMALL and Others.

An agreement, contained by itself less than 1080 words, but there was in it a stipulation, that a clause in a previous agreement, which was duly stamped, should be taken as part of the new agreement:—Held, that, although with the clause referred to, there would be more than 1080 words, a 1*l.* stamp was proper, as that clause ought not to be reckoned.

ASSUMPSIT for interest due on a sum of money agreed to be paid under three written agreements entered into by the plaintiff, with the defendants for the sale of certain mines, &c.

The first agreement was put in, and to that there was no objection.

The second agreement varied the terms of the first, and bore a 1*l.* 15*s.* stamp. This was also read.

The third agreement varied the terms of the second, and contained a stipulation, that one of the clauses in the second agreement relative to referring disputes to arbitration, should extend to the third agreement, in the same manner as if such or the like clause had been inserted in that agreement.

The third agreement bore a 1*l.* stamp.

Campbell, Ludlow, Serjt., and R. V. Richards, for the defendants, objected, that the third agreement could not be read, as it contained more than 1080 words, and therefore ought to have borne a 1*l.* 15*s.* stamp. They admitted,

agreement by *itself*, contained a less number of words than 1080 ; but as the clause of the second agreement relative to arbitrations was referred to in the third agreement, and thereby made part of it, the words of that clause ought to be counted as part of the third agreement, which would make up a greater number than 1080.

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LITLEDALE, J.—I think that the 1*l*. stamp is proper. It is admitted, that the third agreement, taken by itself, is properly stamped, and that that refers to another agreement; and I am of opinion, that clauses of other agreements, which are referred to as this is, do not come within the words of the stamp act, “ every schedule, receipt, or other matter put or indorsed thereon, or annexed thereto (a).

Verdict for the plaintiff—Damages, 16,230*l*.

Scarlett, A. G., Jervis, Russell, Serjt., and Whateley,
for the plaintiff.

Campbell, Ludlow, Serjt., and R. V. Richards, for the
defendants.

[Attornies—*Simcox, and Martineau & M.*]

(a) The words of the stamp act, on agreements, will be found,
55 Geo. 3, c. 184, imposing a duty *ante*, p. 26.

COURT OF KING'S BENCH.

BEFORE LORD TENTERDEN, C. J., BAYLEY, HOLROYD, AND
LITLEDALE, JS.—In Bank.

Campbell now moved for a rule *nisi* for a new trial, on the ground that the third agreement required a stamp of 1*l*. 15*s.*, as, by being referred to, the arbitration clause, contained in the second agreement, must be taken to be part of it, the same as if it had been repeated *verbatim* in the third agreement.

Nov. 8*th*.

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v.
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LORD TENTERDEN, C. J.—I suppose that there was a proper stamp on the second agreement.

Campbell.—Yes, my Lord; but I do not resort to the words of the stamp act respecting schedules indorsed or annexed; but submit, that the referring to this clause is the same in legal effect as repeating it in the agreement; and that, if there had been an award made on any thing respecting this third agreement, and that award had not been performed, the pleader, in drawing a declaration for such non-performance, must have gone upon this clause so referred to, as if it had been a part of the third agreement; and as a clause so referred to is as operative as if it were contained in the agreement, it ought to be stamped accordingly; and if that were not so, parties might, in a dozen words, agree according to the terms stated in such and such pages of some printed book on conveyancing, which would be a complete fraud on the revenue.

LORD TENTERDEN, C. J.—I have no doubt about this case. Whether the duties may be evaded I do not know. I must take the law as it is. Now, the Legislature has put a duty on the number of words contained in the instrument itself, or in a schedule indorsed thereon, or annexed thereto: now this is neither one nor the other; and therefore the 1*l*. stamp is sufficient.

The rest of the Court concurred.

Rule refused.

1827.

BEFORE MR. BARON VAUGHAN.

— REX v. JOSEPH MARTIN.

Aug. 6th.

MANSLAUGHTER.—The indictment charged the prisoner with giving a quartern of gin to Joseph Sweet, a child of tender age, to wit, of the age of four years, which caused his death. The indictment averred the quantity of gin to be excessive for a child of that age. It appeared that the father of the deceased kept a public-house at Wolverhampton, and that the prisoner went there to drink, and having ordered a quartern of gin, he asked the child if he would have a drop; and that, on his putting the glass to the child's mouth, with his left hand, as he held the child with his right, the child twisted the glass out of his hand, and immediately swallowed nearly the whole of the quartern of gin, which caused his death a few hours after.

A party, causing the death of a child, by giving it spirituous liquors, in a quantity quite unfit for its tender age, is guilty of manslaughter.

VAUGHAN, B.—As it appears clearly that the drinking of the gin in this quantity was the act of the child, the prisoner must be acquitted; but if it had appeared that the prisoner had willingly given a child of this tender age a quartern of gin, out of a sort of brutal fun, and had thereby caused its death, I should most decidedly have held that to be manslaughter, because I have no doubt that the causing the death of a child by giving it spirituous liquors, in a quantity quite unfit for its tender age, amounts, in point of law, to that offence.

Verdict—Not Guilty.

Corbet, for the prosecution.

Mr. Justice *Foster* lays down, "if an action, unlawful in itself, (Discourse on Homicide, 261), that be done deliberately, and with in-

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v.
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tention of mischief or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue against or beside the original intention of the party, it will be murder. But if such mischievous intention doth not appear, which is matter of

fact, and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death, because the act upon which death ensued was unlawful."

SHREWSBURY ASSIZES.

BEFORE MR. BARON VAUGHAN.

Aug. 13th.

PRITCHARD v. WALKER.

If the plaintiff subpoens the defendant's attorney to produce books, the latter is not entitled to receive any thing from the plaintiff for expences or loss of time in attending as a witness.

If a person is named in a turnpike act, as one of the trustees of a turnpike road, and has acted as such, and been recognized as a trustee by the plaintiff, the Judge, at the trial of a cause, in which the goodness of his title to act is not the matter directly in issue, will take him to be a good trustee, and will not allow evidence to be given on the part of the plaintiff, to shew that the person has not taken the oath prescribed to be taken by trustees of roads before they act as such.

ASSUMPSIT by the plaintiff, who had been clerk to the trustees of the Shrewsbury and Wrexham turnpike roads, against the defendant as one of the trustees, to recover a balance of salary due to him as clerk. Plea—General issue.

To shew that the plaintiff acted as clerk to the trustees, the defendant's attorney, who had succeeded the plaintiff as clerk of the trustees, was called to produce certain books of the trust, under a *subpoena duces tecum*. The defendant's attorney asked for his expences; but the plaintiff's counsel objected to paying him any thing, as he came to the Assizes as the attorney of the defendant.

VAUGHAN, B.—I do not think that I ought to allow the witness any thing under these circumstances.

The witness was examined, and he also produced the books.

The witness was examined, and he also produced the books.

For the defence, an order of the trustees was produced. It was contained in one of the books put in by the defendant's attorney. This order, to be valid, ought to have been signed by five trustees. It bore the signatures of five individuals, named as trustees in the local act.

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v.
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Campbell, for the plaintiff, wished to shew that Mr. Mathews, one of the five, had no right to act as a trustee, as he had not qualified himself to act by taking the oath prescribed in the 62d section of the general turnpike act, 3 Geo. 4, c. 126, which enacts, that no person shall be "qualified, or capable of becoming or acting as a trustee or commissioner, in the execution of any act of Parliament for making, repairing, or maintaining any turnpike road," unless he shall be possessed of certain property, and unless he shall, before he shall act as such trustee or commissioner, take and subscribe the oath there set forth.

Tannton, contra, relied on the case of a justice acting without having qualified, and contended, as Mr. Mathews was one of the trustees named in the local act, he was merely liable to a penalty if he had acted without taking the oath of qualification.

VAUGHAN, B., (having looked at the book produced by the defendant's attorney).—I find Mr. Mathews constantly acting as a trustee, and the plaintiff treating him as such all the while he was clerk to the trustees. I therefore think I cannot try the goodness of his title to act as a trustee, by way of collateral issue. The turnpike act only says, that persons who have not qualified as trustees shall not be capable of acting; but it does not say that their acts are to be void. Mr. Mathews has acted as a trustee; the plaintiff himself has acknowledged him as such; and I am of opinion, that I must take him to be a good trustee.

The order was read.

Verdict for the plaintiff.

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PRITCHARD

v.

WALKER.

Campbell, Russell, Serjt., and Justice, for the plaintiff.
Taunton, for the defendant.

[Attorneys—Pritchard, and Morrall.]

Aug. 13th.

ANDERSON v. J. W. WATSON, Gent. One, &c.

A. placed money in the hands of his attorney to invest for him, giving the attorney an unlimited discretion to do what was best; the attorney advanced the money to B. on mortgage, but discovering that the security was bad, the attorney sued out a bailable writ in A.'s name against the borrower for the amount, without A.'s knowledge:—Held, that B. could maintain no action against the attorney for arresting him without the authority of A., if the attorney acted *bona fide*, and A. afterwards approved of what he had done.

CASE.—The declaration (which consisted of only one count), stated, that the defendant had wrongfully and injuriously sued out a bailable *capias* against the plaintiff, in the name of one Ann Rowlands, without her authority, and that by virtue of that writ the plaintiff was arrested and imprisoned, and forced to give bail, to the damage, &c. (The count did not aver the termination of the suit) (a). The writ, the arrest, and the execution of the bail-bond, were proved. But the witness, who proved the latter, in his cross-examination, proved a conversation between the plaintiff and the defendant, from which it appeared, that a sum of 200*l.* belonging to Mrs. Rowland, had been lent to the plaintiff on mortgage, through the medium of the defendant, who was her attorney; and that the defendant, having received information that the property mortgaged by the plaintiff had been previously settled on the plaintiff's wife, sued out a writ, and arrested the plaintiff for the amount in the name of Mrs. Rowland. To prove the want of authority, Mrs. Rowland was called on the part of the plaintiff; and she stated that she had placed the money in the defendant's hands, for him to invest for her, and that she knew nothing of the plaintiff, and had never given the defendant any authority to arrest him, and in fact knew nothing of the arrest till after it had happened; but, in her cross-examination, she stated, that

(a) Such an averment is necessary in declarations for malicious arrest; but it seems that it is not

so in a count framed like the present.

she had put the money into the defendant's hands, and that, if it had been lost, she should have looked to him for it; and she also stated, that she left every thing to the defendant, and he was to do for her as he thought best; and that, as soon as she heard the whole of the matter, she approved of what he had done.

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VAUGHAN, B.—I am of opinion, that, if Mrs. Rowland placed her money in the attorney's hands, confiding in him to do what was best, and putting an unlimited discretion in him, and he acted honestly and *bond fide*, supposing that the money would be lost, provided he did not do as he has done, the present action must fail.

Nonsuit.

Curwood and *Bather*, for the plaintiff.

Taunton, *Russell*, Serjt., and *Justice*, for the defendant.

[Attornies—*Bowdler*, and *In person*.]

MORRIS v. DAVIES, and HARRIET, his Wife.

Aug. 14th.

ISSUE directed by the Lord Chancellor, to determine whether the plaintiff was the legitimate son of William and Mary Morris.

This case had been tried at the Spring Assizes for the county of Salop, when a verdict was found for the plaintiff; but Lord LYNTHURST, C., wishing the case to be further considered, and also wishing to have the opinion of the Jury specifically taken on certain questions, directed a new trial.

Every child born in wedlock, the husband and wife being in England, and not separated by any sentence of divorce, is presumed to be legitimate; but this presumption may be repelled, by proof of such facts as satisfy the Jury that no sexual intercourse took place between

The questions were these:—*First*, Whether the Jury

the husband and wife, at a time when the husband could, by possibility, be the father of the child; and the Jury, before they can find against the legitimacy, must be convinced that no such sexual intercourse took place, by irresistible evidence, and not by a mere balance of probabilities. If such intercourse did take place, the adultery of the wife is immaterial; and if there was an opportunity of sexual intercourse between the husband and wife, the law presumes that such intercourse did take place, unless the contrary be satisfactorily proved.

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were satisfied, that there had been *no* sexual intercourse between Mr. and Mrs. Morris, at a time when, by the course of nature, Mr. Morris *might* have been the father of the plaintiff?

Second, Whether the Jury believed the evidence of Mary Evans?

Third, Whether the Jury were satisfied, that the sleeping of Mr. and Mrs. Morris, at Garthllwydd, which was proved by Mrs. Lloyd, took place at the time spoken to by Mary Evans?

On the part of the plaintiff it was proved, that Mr. and Mrs. Morris were married in the year 1778, and that they lived together at Shrewsbury, till the year 1788, when they parted under articles of separation; Mr. Morris going to reside at a place called the Argoed, and Mrs. Morris at Llanfair, which places are fourteen miles asunder. Previous to the separation, Mrs. Morris was delivered of a daughter, who was one of the defendants; and on the 5th of January, 1793, Mrs. Morris was delivered of the plaintiff, who, a few hours after his birth, was carried on horse-back, in the night, to the town of Wem, a distance of between twenty and thirty miles, and was there brought up under the name of Austin, at the house of a weaver of that name.—To shew access, on the part of Mr. Morris, eighteen witnesses were called, who proved, that he was frequently at the house of Mrs. Morris, at Llanfair, in the years 1790, 1791, and 1792; and a witness, named Mary Evans, proved, that in the spring of 1792, Mr. Morris came to the house of his wife, and after they had met at the door, they kissed and embraced, and then went into the parlour, and there remained three hours; and that after this, they left the house and went in a direction towards Garthllwydd, and Mrs. Morris did not return till the next day;—and it was proved by Mrs. Lloyd, of Garthllwydd, that on *one* occasion, but to which *she* could affix no sort of date, Mr. and Mrs. Morris slept at her house, and she had no reason to suppose that they did not sleep together.

For the defendants, evidence was given, which went clearly to shew, that Mr. Morris was wholly ignorant of the existence of the plaintiff; and that, on all occasions, he spoke of and treated Mrs. Davies as his only child;—and, besides this, very distinct evidence was given, that Mrs. Morris, after the separation, kept a servant named William Austin, who was subsequently a captain in the 90th regiment of foot; and that an adulterous intercourse subsisted between Mrs. Morris and this servant. And the defendants' counsel much relied on the circumstance of the plaintiff being, in all respects, treated as the son of Captain Austin; on the circumstance of the personal resemblance, that was proved by several witnesses to exist between him and the Captain; and also on the facts of Mrs. Morris carefully concealing his birth, and of her having, on one occasion, when Mr. Morris had said that she had had a child, fallen on her knees, and asserted, with a dreadful imprecation, that she had never had any child but Harriet, (Mrs. Davies).

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VAUGHAN, B., (in summing up to the Jury).—Every child born in wedlock, the husband and wife being in England, and not being separated by a sentence of divorce *a mensâ et thoro*, is presumed to be legitimate; but that presumption may be repelled by circumstances. However, these circumstances must be such as shall most clearly satisfy you, that there was *no* sexual intercourse between the husband and the wife, at a time when the husband could, by possibility, be the father of the child. It must not rest on a mere balance of probabilities, but the negative of the legitimacy must be proved by irresistible evidence. You must, therefore, be satisfied that *no* such intercourse took place between the husband and wife, before you can find a verdict for the defendants; for if there was *any* sexual intercourse between the husband and the wife, at a time when, by the course of nature, the husband *might* be the father of the child, any infidelity

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that she might be guilty of would not vary the case ; and it matters not that " the general, camp, pioneers and all, had tasted her sweet body," (if I may be allowed that expression); because the law fixes the child to be the child of the husband. I ought also to tell you, that if there was any *opportunity* for sexual intercourse, the law presumes it to have taken place, as between the husband and the wife; and if there was such an *opportunity* of sexual intercourse between the husband and the wife, in this case the law presumes that it occurred. It does not lie on the plaintiff to shew, that there *was* actual sexual intercourse, but the defendants must shew that there *was not*. A good deal of time has been occupied in shewing, that an adulterous intercourse subsisted between Mrs. Morris and the servant, William Austin, and of that fact there can be no doubt; but still, the question here must be governed by the rules I have laid down ; and if, from any sexual intercourse between Mr. Morris and his wife, the plaintiff *could* be the son of Mr. Morris, it does not signify how often she might have been guilty of adultery, or whether the plaintiff was really the son of the adulterer, or not.

The Jury found a verdict for the defendants.

VAUGHAN, B.—Then, gentlemen, you are not satisfied of the sexual intercourse between the husband and the wife?

Sir *R. Chambre Hill*, (the foreman of the Special Jury).—We do not think that there was sexual intercourse.

VAUGHAN, B.—Gentlemen, I should wish to ask you, whether you believe the testimony of Mary Evans?

Sir *R. Chambre Hill*.—We do not place any confidence in Mary Evans.

VAUGHAN, B.—Do you believe the account of the sleeping at Garthllwydd to relate to the same time?

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Sir R. Chambre Hill.—We do not, my Lord.

Russell, Serjt., Curwood, and Whateley, for the plaintiff.

Taunton, Campbell, Peake, Serjt., and R. V. Richards, for the defendants.

[Attornies—Watson & Harper, and Rumsey.]

In the ensuing Term, *Russell*, Serjt., made an application to the Court of Chancery, to direct a new trial—on the ground, that the verdict was against evidence, and against the opinion of the learned Baron who tried the cause. This application was argued; but the law, as laid down by the learned Baron at the trial, was not questioned by either party.

On the subject of legitimacy, see *St. Andrew's v. St. Bride's*, 1 Str. 51, and the authorities there cited; *Bract. lib. 1, fo. 6, c. 4*; 43 *Edw. 3, 18 (b) 20*; 1 *Hen. 6, 3*; *Pendrell v. Pendrell*, 2 Str. 925; *Lomax v. Holmden*, Id. 946; *Rex v. Rending*, Rep. temp. Hard. 79; *Rex v. Rooke*, 1 Wils. 340; *Doe dem. Goodright v. Saul*, 4 T. R.

359; *Rex v. Luffe*, 8 Ea. 193; *Rex v. Kea*, 11 Ea. 132; *Head v. Head*, Sim. & Stu. 150; *S. C.* on appeal 1 Turn. 138.

For the resolutions of the Judges on the question of legitimacy in the Banbury Peerage, see Sim. & Stu. 153; but an abstract of them will be found in 2 *Selw. N.P. tit. Ejectment*, p. 738.

DOE, on the Demise of LLOYD, v. EVANS.

Aug. 17th.

EJECTMENT by the lessor of the plaintiff, to recover certain lands which had belonged to Gwin Lloyd, Esq.

The lessor of the plaintiff claimed under the same title

An admission made by a party before an arbitrator, may be used as evidence on the trial of

another cause, and is not to be considered as an admission made with a view to a compromise. The mere circumstance of a witness being too ill to attend the trial, is no sufficient ground for reading his deposition taken in Chancery.

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as he did in the case of *Doe dem. Lloyd v. Passingham*, (which see *ante*, Vol. ii. p. 440); and the defendant was a tenant of Colonel Passingham, who was the defendant in that case; and this case, as well as the former, turned on the same question, whether Colonel Passingham's mother was the legitimate daughter of Gwin Lloyd, Esq. To shew seisin in Gwin Lloyd, Esq., in the lands in question, Mr. Pownall, the attorney for the lessor of the plaintiff, produced an abstract of the title of the estate in question, which had been furnished by Mr. Sandys, the then attorney of Colonel Passingham, for the purpose of being used on an arbitration, the parties to which were the father of the lessor of the plaintiff, and Colonel Passingham.

Russell, Serjt., and *E. V. Williams*, objected, that as this abstract was furnished for the purposes of an arbitration, it was not admissible in evidence, any more than any other admission made with a view to a compromise.

VAUGHAN, B.—I think that if an admission is made when a case is before an arbitrator, it is not more privileged than a similar admission would be, if there were a cause in Court. An arbitration-room is any thing but a forum of confession; and the whole difference between that and a Court of justice is, that it is a tribunal chosen by the parties themselves; but still, a matter comes as adversely before an arbitrator as before any other tribunal.

The evidence was received.

Taunton, for the plaintiff, wished to give in evidence the deposition of a witness, named Martha Mills, who had been examined in the Court of Chancery, in a suit between the father of the lessor of the plaintiff, and Colonel Passingham.

To let in this evidence a witness proved, that he saw

Martha Mills a few days before the trial, and that she appeared to be nearly one hundred years of age, and was bed-ridden, and quite unable to attend any trial.

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Taunton.—I submit, that, under these circumstances, the deposition is admissible. If you can prove a witness to be abroad, or out of the reach of process, the same rule applies as if he were dead, or had fallen sick by the way. This was laid down in the case of *Kinsman v. Crooke (a)*.

VAUGHAN, B.—These things are, in cases of issues out of Chancery, regulated by an order of that Court, that the depositions of particular witnesses may be read; but I think, that the mere circumstance of the witness being unable to attend here by reason of sickness, is no sufficient ground for admitting a deposition. This is generally a ground for postponing the trial.

The evidence was rejected (*b*).

Much of the evidence given on both sides, at the former trial, was again adduced, and the Jury found a

Verdict for the defendant.

Taunton, Campbell, and R. V. Richards, for the lessor of the plaintiff.

Russell, Serjt., and E. V. Williams, for the defendant.

[Attornies—*Pownall*, and *Roake*.]

(a) 2 Ld. Raym. 1166.

(b) The authorities on this sub-

ject will be found in Phill. Law of Ev. 360.

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HEREFORD ASSIZES.

BEFORE MR. BARON VAUGHAN.

REX v. JAMES.

Aug. 22nd.

If a party has been held to bail, or committed for more than twenty days, on a charge of felony, and the Grand Jury ignore the bill for the felony, and find a bill for a misdemeanor, in attempting it; the party is entitled to traverse.

THE prisoner had been held to bail, for the capital offence of rape, more than twenty days; but the Grand Jury ignored the bill for the capital offence, and found a true bill for an assault, with intent to commit a rape.

The defendant's counsel applied to traverse.

VAUGHAN, B., allowed the defendant to traverse, on the ground, that he had not been on bail for twenty days, on the charge of misdemeanor, upon which he was to take his trial.

Curwood, for the prosecution.

C. Phillips and *Godson*, for the defendant.

[Attornies.—*Dangerfield*, and *Devereux*.]

This point has been ruled by the Judges on other Circuits. By the stat. 60 Geo. 3, and 1 Geo. 4, c. 4, s. 3, it is enacted, that where any person prosecuted for a misdemeanor, by indictment,

shall have been in custody, or held to bail to answer such offence, twenty days before the Session, he shall not be entitled to traverse. The words of this section will be found in Carr. Supplem. p. 59.

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NEWPORT v. HOLLINGS.

Aug. 23rd.

TROVER for a post chaise. The plaintiff was a coach-maker at Worcester, and it appeared that a person named Cooper, who kept the George Inn at Ledbury, wishing to commence the posting business, ordered a post chaise of the plaintiff; but while that chaise was fitting up, it was agreed that the plaintiff should lend him an old chaise to use till the new one was got ready. This old chaise, which was the subject of the present action, was accordingly lent to Cooper; and it was let out by him to his customers in his business of an inn-keeper; but his name was not painted on it in pursuance of the stat. 4 Geo. 4, c. 62, s. 11, which compels owners of post chaises to have their names painted on them. Cooper became bankrupt, and his assignee, who was the present defendant, claimed to hold this chaise as property in the order and disposition of the bankrupt, at the time of his bankruptcy, under the 72nd sect. of the bankrupt act, 6 Geo. 4, c. 16.

To support this defence, the commission of bankrupt against Cooper, dated on the 8th of April, 1827, was put in, and the assignment to the defendant as assignee.

Campbell, for the plaintiff, objected, that the trading, petitioning creditor's debt, and act of bankruptcy should be proved.

Russell, Serjt.—This is an action against an assignee, and no such proof is required, as there has been no notice of disputing the commission.

Campbell.—We sue the defendant as a wrong doer; we do not sue him as the assignee of Cooper (a).

(a) By the stat. 6 Geo. 4, c. 16, sect. 90, it is enacted, "that in any action *by or against* any assignee" no proof shall be required

If a person, who is in fact assignee of a bankrupt, be sued in trover, and it appear that he claims the good as property belonging to the bankrupt; in making out this defence, he need not give evidence of the trading, &c. unless there has been notice of disputing the commission, although he be not, in point of form, *sued as assignee*.

If an inn-keeper borrow a chaise from a coach-maker while he has a new chaise making, and use it in the course of his trade, but does not have his name painted upon it, under the stat. 4 Geo. 4, c. 62, s. 11, this is not such a reputed ownership of the borrowed chaise, as will entitle the assignees of the inn-keeper to detain it from the coach-maker.

of the petitioning creditor's debt, &c., unless the notice of disputing them has been given."

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VAUGHAN, B.—My impression is, that it is not necessary for the defendant to prove the trading, &c., and I shall hold so; for although the defendant is not formally sued as assignee, yet the plaintiff knew that he was acting as such, and claimed to keep this chaise on that very ground.

To shew the reputed ownership, several witnesses were called, who stated, that the chaise was used precisely as if it had been Cooper's own; and that it was used by his customers about a dozen times; and that it was reputed to be his chaise by those who were his neighbours.

VAUGHAN, B.—This does not appear to me to be any thing like a case of reputed ownership. This chaise, it appears, was used about a dozen times, and it must often happen that when an inn-keeper's chaises are repairing, he must borrow of his coach-maker; but still this is not at all like a case of reputed ownership, nothing like the case of a man making a secret bill of sale of all his goods, and then being allowed by the vendee to gain credit by retaining possession of them and dealing with them as his own. I take it to be clear, that where property is delivered for a particular and special purpose, to one who becomes bankrupt, it does not pass to the assignee as goods in the order and disposition of the bankrupt, such as bills deposited with bankers, and entered short, or the like. A strong fact in this case against the reputed ownership, is, that although inn-keepers are bound, by an act of Parliament, to put their names and a number on their chaises, yet the bankrupt, by never putting his name on this chaise, clearly indicated that he never meant to assert that the chaise was his own; and, at the same time, gave all those who saw it good reason to suppose that the chaise was not in fact his property.

Verdict for the plaintiff—Damages 8*l*.

Campbell, and *Godson*, for the plaintiff.

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Russell, Serjt., and *Malkin*, for the defendant.

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[Attornies—*Godson*, and *Higgins*.]

IN the ensuing Term, *Russell*, Serjt., applied for a new trial, on the ground that there was not sufficient evidence of a conversion; but the Court

Refused a rule.

Bull-Baiting (a).

COURT OF KING'S BENCH.

Ex parte JOHN HILL.

Nov. 28th.

CURWOOD moved for a writ of *habeas corpus* to bring up the prisoner who had been committed to Stafford gaol on a warrant under the stat. 3 Geo. 4, c. 71, (commonly called Mr. Martin's act), which charged, that he "did, on &c., at &c., unlawfully, wantonly, and cruelly abuse and ill-treat certain cattle, to wit, a bull, by then and there baiting, and causing the said bull to be baited, with dogs, contrary to the statute made" in the 3rd Geo. 4 (b). He contended, that the commitment was illegal on two grounds: *First*, that it appeared on the face of the warrant, that the offence there charged was bull-baiting, which he was prepared to shew was a lawful sport; and *secondly*, that

Bull-baiting is not punishable under the stat. 3 Geo. 4, c. 71, for preventing cruelty to cattle, as bulls are not included in that statute. If a writ of *habeas corpus* be granted, on the ground that the party has been illegally committed by a magistrate, the Judge will not make it a part of the rule for issuing the writ, that the party shall not bring an action against the magistrate.

(a) This being a case of very considerable importance, and it being probable that it will not be reported in any other work, we have thought right to insert it: we have been favoured with this report, by one of the counsel engaged in it.

(b) By this stat. "If any person or persons shall wantonly and cruelly beat, abuse, or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle" such person or persons are made liable to a penalty, not exceeding 5*l.*, nor less than 10*s.*

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a bull was not within the provisions of the stat. 3 Geo. 4, c. 71, upon which the conviction was founded.

Lord TENTERDEN, C. J., suggested, that a rule to shew cause should be granted, and that, as it was the last day of Term, cause should be shewn at chambers, during the vacation; which suggestion was acted upon by the Court.

Dec. 6th.

In the following week *Starkie* and *Holroyd* shewed cause before BAYLEY, J., and contended, that the bull was included in the stat. 3 Geo. 4, c. 71, under the term "other cattle," and that as cock-fighting had been declared to be an illegal sport, it followed that bull-baiting was so likewise.

Curwood, contra, argued, that it was a rule in the construction of acts of Parliament, that where there was an enumeration, beginning with the lower degrees, and general words, embracing others *ejusdem generis* at the end, these general words did not include a superior degree, which was not named in the act; and he cited the case of the Archbishop of Canterbury, 2 Rep. 46, where it was held, on the stat. 13 Eliz. c. 10, which mentions deans and chapters, parsons and vicars, and *all other persons whatsoever having spiritual promotion*, that the words did not extend to bishops, a superior order, who were not named therein; and he contended, therefore, that as, in the statute now in question, the enumeration began with ox, cow, and heifer, omitting bull, and concluded with other cattle, it did not include a bull, the bull and the bishop standing *in pari statu*, with reference to the words of those statutes respectively. With regard to bull-baiting being unlawful, he stated, that bull-baiting was expressly named in *Pulton De pace regis et regni* among the sports lawful for the people of England to enjoy(c); and being

(c) Pulton lays down, under title bly of three persons or more, "Riot" p. 261, that "an assem- which is not to the terror of the

recognized as lawful, nothing could alter it but the legislature; and his Lordship would recollect the fate of several bills for the abolition of bull-baiting.

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Starkie.—This statute begins with mentioning the horse, which is a superior animal to the bull; and therefore the bull is included in the general words.

BAYLEY, J.—Horse, mare, and gelding, are one class; ox, cow, heifer, and steer, are another class: and in my opinion the bull is not included in this act of Parliament; and if that be so, the prisoner is entitled to be discharged. However, I will consult with my brother LITTLEDALE, and if his opinion coincides with mine, I shall grant a writ of *habeas corpus*.

His Lordship having consulted with Mr. Justice LITTLEDALE, directed a writ of *habeas corpus* to issue.

On the following day, the attorney for the magistrate applied to Mr. Justice LITTLEDALE, to make it part of the rule for the writ of *habeas corpus*, that the party should be restrained from bringing any action against the magistrate for false imprisonment.

people, nor to do some act with force and violence against the peace, is not unlawful. The watch in London upon Midsummer's night is lawful; and so be such like in other cities and towns. Assemblies be lawful that be used upon May-day to fetch in May boughs or flowers; and so be assemblies at church ales, Whitsun and Midsummer ales. Assemblies at the fetching home, setting up, or dancing round a May-pole; and assemblies at the baiting of a bull or bear, and at the mowing or making

a doll or revel mead; and assemblies of minstrels and their fellows at certain places and times of the year, allowed by ancient custom, are also lawful; and assemblies to play at cards, tables, bowles, clash, bucklers, wasters, half-sword, tennis, quoits, cailes, or such other games, be likewise, by the common law, tolerable; and assemblies to run at quin-ball, sand-bag, base, feet-ball, stool-ball, hand-ball, and such like disports, be likewise lawful."

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LITLEDALE, J. —If the imprisonment is illegal, I cannot restrain the party from pursuing his remedy by action (a).

Rule absolute.

Curwood, in support of the application.

Starkie and *Holroyd*, for the magistrate.

[Attornies—*Fellowes*, and *Spurrier & Ingleby*.]

(a) There were five other cases; gistrate paid the parties convicted
and we are informed that the ma- a compensation in each case.

CASES

AT

NISI PRIUS.

COURT OF COMMON PLEAS.

*Adjourned Sittings in London, after Trinity
Term, 1827.*

BEFORE LORD CHIEF JUSTICE BEST.

LAWRENCE and Another, Assignees of TOLSON, a Bankrupt, *v.* CROWDER and Another (a).

1827.

July 21st.

TROVER for goods stated in the first count to have been the property of the bankrupt before the bankruptcy; and in the second, laid as the property of the plaintiffs, the assignees. Plea—Not Guilty.

In an action by the assignee of a bankrupt, a plea was delivered to the plaintiff's attorney by a clerk of the defendant's attorney, who, through mistake, omitted to deliver with it a notice to dispute the bankruptcy.

It became a point in the cause, whether a notice had been given to dispute the act of bankruptcy under the 90th section of the 6 Geo. 4, c. 16 (b), which requires it to be

A few hours after, as soon as the omission was discovered, the plea was fetched away on the pretence that there was some error in it; and, in the course of the same day, a fresh plea was delivered, accompanied by a notice:—It was held, at *Nisi Prius*, that, although the term for pleading had not expired, the notice was not sufficient under the 90th section of the 6 Geo. 4, c. 16; but the Court of Common Pleas, under the circumstances, granted a new trial, on payment by the defendant's attorney of the costs as between attorney and client.

(a) This and the eleven following cases were omitted in the last part on account of motions for new trials, &c. not having been argued.

(b) This section enacts, "That in any action by or against any assignee, or in any action against

" any commissioner or person acting under the warrant of the commissioners for any thing done as such commissioner, or under such warrant, no proof shall be required at the trial of the petitioning creditor's debt or debts, or of the trading or act

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delivered at or before pleading. The time for pleading expired on the 27th of February; and on the 26th, a clerk of the defendants' attorney delivered a plea, without any notice attached to it, at the office of the plaintiffs' attorney; and a few hours afterwards he went there again, and said there was a mistake in the plea he had delivered, and got it back, and, about half an hour after that, delivered a fresh plea, with a notice, saying, that was the plea which it was intended to deliver, but not saying that any notice had been added. The clerk to the plaintiffs' attorneys, on receiving it, said, "Very well." When the plaintiffs' attorneys discovered that a notice had been added, they sent back the plea, accompanied by a letter, stating that they had no objection to any alteration in the plea, but that they objected to the notice, as being out of time. The defendants' attorney's managing clerk was called, and stated, that it was never intended to deliver the plea without the notice; that it was done altogether by mistake, without the knowledge of his principal; and that, when he ascertained what was done, he immediately directed it to be fetched away, and sent another in its stead.

Wilde, Serjt., for the plaintiffs, contended, that this was not a sufficient notice. He cited *Poole v. Bell* and *Others* (a).

"of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and, if plaintiff, before issue joined, give notice, in writing, to such assignee, commissioner, or other person, that he intends to dispute some, and which of such matters," &c.

(a) 1 Stark. N. P. C. 328. In this case, which was an action by the assignee of a bankrupt, the defendant had pleaded the

general issue, without notice of his intention to dispute the bankruptcy, but before the time for pleading expired, he delivered the general issue afresh, accompanied by such notice. Lord *Ellenborough* held, that the notice was insufficient, saying, that the first plea was good and effectual to all purposes, and the defendant ought to have moved for leave to withdraw it, in order that he might plead *de novo*.

Taddy, Serjt., for the defendant, submitted, that it was.

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BEST, C. J.—I am of opinion, that a plea having been delivered, a notice to dispute the bankruptcy of Tolson could not be afterwards given. If I have put an erroneous construction on the act, the Court will set me right.

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Verdict for the plaintiffs.

Wilde, Serjt., and *Fish*, for the plaintiffs.

Taddy, Serjt., and *Comyn*, for the defendant.

[Attornies—*Green & A.*, and *Hyde*.]

IN the ensuing Michaelmas Term, a rule *nisi* was obtained, which came on to be argued in Easter Term, 1828. The Court, as it appeared that there was ground for disputing the act of bankruptcy, granted a new trial, on payment by the defendant's attorney of the costs as between attorney and client, and on the condition, that if the act of bankruptcy should be proved to the satisfaction of the Judge who should try the cause, the plaintiff should have judgment of the Term. By this rule of the Court, the opinion given by the Chief Justice at *Nisi Prius*, is confirmed.

The case of *Bernasconi v. The Earl of Glengall*, 1 Mann. & Ryland, 326, decides, that in an action by assignees of a bankrupt,

if the defendant does not give notice to dispute the trading, &c., he cannot dispute the validity of the commission itself.

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*Adjourned Sittings at Westminster, after Trinity
Term, 1827.*

BEFORE LORD CHIEF JUSTICE BEST.

Oct. 4th.

FOLKS v. SCUDDER and Another.

The correctness of the bond given to the Lord Chancellor under the 13th section of the Bankrupt Act, cannot be disputed at *Nisi Prius*, in an action to try the validity of the commission, in the case in which it was given. Nor can it be considered there, whether the defendant's attorney has agreed to accept a notice to dispute which had been delivered after the time mentioned in the act of Parliament.

TRESPASS by Mary Folks, a bankrupt, against Scudder and Harris, the executors of the petitioning creditor, to try the validity of the commission against her.

Adams, Serjt., for the plaintiff, stated, that the bond given to the Lord Chancellor, under the 13th section of the bankrupt act, was incorrect, and could not be supported.

BEST, C. J.—I shall not inquire into that here. That is a matter for the Lord Chancellor. I shall take it for granted, that the Lord Chancellor has not issued the commission improperly.

Adams, Serjt.—I am in a condition to shew, that the bond has been altered.

BEST, C. J.—That will not alter my opinion. If there was no bond at all, I should not take any notice of that circumstance. That is all for the Lord Chancellor.

The plaintiff's attorney was then called to prove that notice to dispute the act of bankruptcy had been delivered. He stated that it was not delivered till after issue joined (a), but added, that the defendants' attorneys had said

(a) See sect. 90 of the 6 Geo. 4, c. 16, in a note to the preceding case of *Lawrence v. Crowder*.

that it was of no consequence, the notice was sufficient, and would do very well, or something to that effect.

This, it was contended by *Adams*, Serjt., on the part of the plaintiff, was sufficient to make it incumbent on the defendants to prove the act of bankruptcy.

BEST, C. J.—I think you will find yourself in this difficulty—supposing all this to be true, am not I bound to take the law from the act of Parliament? I doubt whether the matter can be inquired into at *Nisi Prius*. The most convenient course is, that it should not be. The Court, on application, may make the defendants' attornies pay the costs of a new trial, if they have acted in the manner stated. I think the fair thing would be, for the defendants' attornies, if they really accepted the notice, to withdraw their opposition now; but if they will not, are we to try at *Nisi Prius* the credit of these witnesses, as to the fact whether there was an acceptance or not? I think I ought to nonsuit the plaintiff.

Wilde, Serjt.—I mean to contradict the fact, as stated by the plaintiff's attorney, and have the witness here.

BEST, C. J.—That is what I wish to avoid.

Miller, for the plaintiff.—Are not the defendants bound by the act of their attornies?

BEST, C. J.—They may or may not be bound by it; but this is not the place where that question is to be decided.

Miller.—As to the other point, the Lord Chancellor has ordered the bond to be produced here; and I submit that the validity of the commission, as depending upon it, is a question to be decided by the Jury.

BEST, C. J.—I remember a case, in which my Lord Ken-

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yon told me, that on such a point I could not be heard at *Nisi Prius*. I never knew the validity of such a bond as this disputed in a Court of Common Law.

Nonsuit.

Adams, Serjt., and *Miller*, for the plaintiff.

Wilde, Serjt., and *Comyn*, for the defendants.

[Attornies—*R. P. Smith*, and *Baddeleys*.]

IN the following Term, a rule *nisi* for a new trial was obtained on affidavits, which in Easter Term, 1823, was discharged after argument.

See the case of *Bernasconi v. The Earl of Gkengall*, 1 Man. & Ry. 326, which was an action by the assignees of a bankrupt. No notice had been given to dispute the trading, &c.; and the recital in the commission, that the party became bankrupt, within the intent and meaning of the bankrupt act then in force, was held to be conclusive of the fact of the commission of an act of bankruptcy since

the passing of that act. Lord *Tenterden*, in the course of his judgment, said, "We cannot presume the fact to be otherwise, seeing it, as we do, asserted and attested by the affixing the Great Seal to the commission; and if such a question can be raised at all, the proper mode of raising it would be by an application to the Lord Chancellor."

Oct. 4th.

One of several joint-tenants may sign a warrant of distress, if the others do not forbid him. If they, when applied to, merely decline to act, that will not prevent him from proceeding.

ROBINSON v. HOFFMAN.

REPLEVIN.—The cognizance relied on by the defendant, was stated in the plea to be as bailiff of Henry Marchant, Samuel Cullum, and Stephen Cullum. The warrant authorizing the distress was signed only "Henry Marchant, Landlord." The lease under which the plaintiff held, was granted by the three persons mentioned in the cognizance, they holding the property as joint tenants.

Wilde, Serjt., for the plaintiff, contended, that the ap-

pointment by Henry Marchant alone did not constitute the defendant bailiff of the three persons, as mentioned in the cognizance. He cited Year Book, 7 H. 4, fol. 34, pl. 1.

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Storks, Serjt., for the defendant.—Adoption will do in the case of joint-tenants. If one joint-tenant is at liberty to make the distress on his own account, he may also, by himself, appoint a bailiff; but adoption is not necessary.

Fish, on the same side, referred to the case of *Pullen v. Palmer* (a).

BEST, C. J.—I think it will be better to reserve the point for the opinion of the Court.

Wilde, Serjt., then called Mr. Samuel Cullum, who stated, that he was applied to to sign the warrant of distress; but he declined to sign it, and had not subsequently recognized the act of Mr. Marchant. He stated, that the ground of his not signing was, because he understood that the rent was due to a person named Willats.

BEST, C. J.—Upon this evidence, I shall let the plaintiff have a verdict, subject to a motion for a nonsuit. I think, that, in general, one joint-tenant may distrain; but where he is distinctly told that he must not do it, that puts an end to his authority, and distinguishes the case from that which has been referred to.

Verdict for the plaintiff.

Wilde, Serjt., and *Platt*, for the plaintiff.

Storks, Serjt., and *Fish*, for the defendant.

[Attornies—*Arrowsmith*, and *Lane*.]

(a) 3 Salk. 207. That case decides, that one joint-tenant may distrain, but that he cannot avow alone.

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IN the ensuing Michaelmas Term, a rule *nisi* was obtained, pursuant to the leave given. The case of *Lee v. Shepherd* (a), which was not mentioned at *Nisi Prius*, was cited, in addition to that of *Pullen v. Palmer*.

The rule came on to be argued in Easter Term, 1828, and was then made absolute, the Court saying that, as the witness Cullum *merely declined signing*, the case was not distinguishable in principle from that of *Lee v. Shepherd* (b).

(a) 5 J. B. Moore, 297. The two points decided in that case are, *first*, that one of several co-heirs in gavelkind, may distrain for rent due to himself and his co-heirs, without an express authority from them so to do; and, *secondly*, that an avowry by him in his own right, and a cognizance as the bailiff of the others, is sufficient, without averring any authority from them to distrain.

(b) It may be worthy of consideration, whether the inclination

of the opinion of the learned Chief Justice at *Nisi Prius* is not the most correct, according to the evidence of Mr. Cullum. That gentleman stated, that he declined to join in the warrant, because he understood that the rent was due to another person; and it seems rather difficult to say that such conduct was not expressive of an opinion that the distress ought not to be made; and if so, then in substance and effect it amounted to a prohibition.

Further Adjourned Sittings in London, after Trinity Term, 1827.

BEFORE LORD CHIEF JUSTICE BEST.

Oct. 11th.

PINCHON v. CHILCOTT.

A verbal agreement was made for the purchase of some turnips growing in a field.

ASSUMPSIT for goods sold, with the money counts, and an account stated.—The action was brought to reco-

After the purchaser had removed the principal part, the seller said to him, "You owe me 3*l*," to which he replied, "I will send it before I draw any more turnips." He afterwards drew all the turnips, but did not send the 3*l*.:—Held, that it was recoverable on the account stated.

ver the sum of 3*l.*, being the balance due for a quantity of turnips sold, by a verbal contract, while they were in the ground. The principal part of the turnips had been removed by the defendant, when the plaintiff said to him, "You owe me 3*l.*" The defendant replied, "I will send it before I draw any more turnips." He afterwards drew the remainder of the turnips, but did not send the money. The ground had been measured for the purposes of the agreement.

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Wilde, Serjt., for the defendant, contended, that, as it appeared that the turnips were sold while they were in the ground, and were drawn by the defendant, the contract related to an interest in the soil, and could not be made the subject of an action for goods sold. The 3*l.* does not appear to be due for the part which was actually delivered, but for that part which was remaining in the ground. It seems, also, that the ground was measured, and not the turnips.

BEST, C. J.—What do you say to the account stated?

Wilde, Serjt.—That is answered by the nature of the thing—the connection with the soil. The agreement relates to an interest in the land.

Chitty, for the plaintiff.—With respect to the 3*l.*, it is spoken of as a sum actually *due*, and that must be taken to be for the part which had been delivered. I submit, that this is quite sufficient, upon the account stated.

BEST, C. J.—I think that the plaintiff may recover upon the account stated.

Verdict accordingly.

Chitty, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornics—*Smith, L. & Co.*, and *Miller*.]

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IN the ensuing Michaelmas Term, *Wilde*, Serjt., obtained a rule *nisi* for setting aside the verdict; and *Jones*, Serjt., afterwards shewed cause against it; but the matter was eventually arranged by the entry of a *stet processus*.

See the case of *Knowles v. Mitchell*, 13 East, 249, which decides, that an admission by a defendant that a certain sum was agreed to be paid to the plaintiff for the sale of standing trees, made after the

trees had been felled and taken away by the defendant, will support a count on an account stated, but not a count for goods sold and delivered.

Oct. 12th.

BATTHEWS v. GALINDO.

A woman, who lives in a state of concubinage with a man, and passes as his wife, is a competent witness for him in an action brought against him, and is not under the same incapacity of giving evidence in his favour, as she would be, if she were really his wife.

ASSUMPSIT on a bill of exchange. Defence—Usury. The witness, who was called to prove the usury, on her cross-examination, said, that she lived in the same house with the defendant, and had had several children by him.

BEST, C. J.—I shall not receive the evidence of this witness. I am of opinion, that she ought not to have been called. A woman living with a man, as his wife, has precisely the same interest as if she were his wife. In the case of *Campbell v. Twemlow* (a), the late Lord Chief Ba-

(a) 1 Price, 81. This was a case before an arbitrator, in which he had refused the evidence of a woman similarly circumstanced with the witness in the present case. The instance alluded to is thus mentioned in page 83:—

Richards, B.—I remember a prosecution tried at Chester, before my Lord *Kenyon*, in 1782, at a time when he was perhaps in the zenith of his legal knowledge, wherein his Lordship sanctioned

the doctrine of the inadmissibility of the evidence of a person in the situation of this witness. The prisoner, in that case, was tried on a charge of forgery. Being a man of competent education, he addressed the Court in his defence with considerable effect. In the course of his speech, he frequently alluded to a woman, who then accompanied him, and whom he spoke of as his wife; and he concluded by offering her evidence in

ron, then Mr. Baron *Richards*, mentions an instance in which Lord *Kenyon* refused to admit such a person as a witness in a criminal prosecution. The only difficulty is in getting at the fact. I doubt whether I was not wrong in allowing the question to be asked of her as to the children; but if you prove it by any other witness, I will not receive her evidence. After Lord *Kenyon* refused, in a case of life and death, to permit a woman, living with a man as his wife, to give evidence to protect his life, I shall certainly not admit her as a witness for the purpose of protecting his property.

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A person was then called, who stated, that he had frequently seen the defendant and the witness walking arm in arm together, and that, on one occasion, they had a child with them.

BEST, C. J., left it to the Jury to say, whether the witness was in the situation in which she was said to be; and directed them, if they thought she was, to find a verdict for the plaintiff.

Verdict for the plaintiff.

Wilde, Serjt., and ———, for the plaintiff.

E. Lawes, Serjt., for the defendant.

[Attornies—*Orchard*, and *Ritchin*.]

In the ensuing Term, *E. Lawes*, Serjt., obtained a rule nisi, for a new trial; which came on to be argued in Easter

corroboration of some facts which he had stated. When the objection of her being his wife was taken, he said, that they were not, in fact, married: but his Lordship would not permit him to call her, after having spoken of, and re-

presented her as his wife. And he was convicted and executed.

The case was determined upon another point; and the Court abstained from giving any opinion on the question of the admissibility of the woman's evidence.

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Term, 1828, when *Best*, C. J., admitted, that his ruling at *Nisi Prius* was wrong, and stated, that he had been led into it by the incorrect decision of Lord *Kenyon* (a).

The rule for a new trial was therefore made absolute (b).

(a) Lord Chief Baron *Thomson*, in his judgment in *Campbell v. Twemlow*, said, "Every thing, both in law and in fact, must, in this instance, have been referred to the arbitrator. He has adjudged the case; and he has decided on not calling this woman, who was tendered as evidence on the part of the plaintiff," &c. "It was certainly a doubtful question; and the case alluded to by my Brother *Richards* shews, that the course pursued by the arbitrator on this occasion has been sanctioned by my Lord *Kenyon*, whose opinion must ever be held in respect and reverence."

(b) See 1 Moore & Payne.

In the case of *Cundell v. Pratt*, which was tried the same day, *Spankie*, Serjt., was observing on the testimony of a woman, who had been called as a witness, and saying that she was protected by the rules of law from answering such questions as might disparage her character, *Best*, C. J., said, "I, for one, till I hear it decided by the House of Lords, shall not go so far. I shall only prevent your asking such questions as may subject witnesses to a prosecution for crime, but not such questions as merely tend to degrade them in their character."

Oct. 16th.

CRISDEE v. BOLTON.

In an agreement for the sale of a public-house, it was stipulated, that the seller should not be concerned in carrying on the business

of a publican, within a mile from the house he had parted with, "under the penal sum of 500*l.* the same to be recoverable as and for *liquidated damages*." Notwithstanding this, he opened a public-house, about three quarters of a mile off. No evidence of actual damage was given by the plaintiff, but for the defendant some witnesses stated that the plaintiff had spoken of the injury as not considerable. It was held at *Nisi Prius*, that the whole sum was recoverable as stipulated damages, but left to the Jury to state what was the actual damage. The Jury found for the whole sum, and the Court of Common Pleas refused to grant a new trial.

SPECIAL assumptionit—The defendant had sold to the plaintiff the lease and good-will &c., of a house called the *Blenheim Tavern*, and the action was brought to recover damages for a breach of the following clause in the agree-

ment made between the parties on the subject of that sale.—

“ And it is fully agreed by the above-named parties, that the said William Bolton shall not, either directly or indirectly, take or be in any way concerned in carrying on the trade of a licensed victualling house, within the distance of one mile of the above house, during the time the same is occupied by the said Jethro Crisdee, or any part of his family, under the penal sum of 500*l.*, the same to be recovered as and for liquidated damages.”

It appeared that the defendant had taken a house called the Montpelier, about three quarters of a mile from the Blenheim Tavern. No evidence was given on the part of the plaintiff, of the actual damage sustained by him, as he sought to recover the whole 500*l.* But on the part of the defendant, some evidence was given of loose conversations, in which the plaintiff was represented to have spoken of the injury as not considerable.

Wilde, Serjt., for the defendant, submitted, that the 500*l.* was not to be considered as liquidated damages, and that it was for the jury to say, under all the circumstances, what was the damage which the plaintiff had actually sustained. In the case of *Riley v. Jones* (a), which may appear to be an authority against me, the agreement is different from the present. In the case of *Davis v. Renton*, the Court remarked upon the introduction of the word “ penal.” (a) Lord *Tenterden* says, “ whoever fram-

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(a) 8 J. B. Moore, 244, S.C. 1 Bing. 302. This was an action of *assumpsit*, on an agreement for the sale of the lease of a public-house. There was a clause in the agreement, that law expenses, &c. should be paid by the parties, in equal moieties, “ and that either of them not fulfilling all and every

part, the party not fulfilling,” should “ pay unto the other, the sum of 500*l.*,” thereby “ settled and fixed as liquidated damages.” It was held that the 500*l.* was not a mere penalty to cover the actual damage, but a sum to be recovered on any breach of the agreement.

(a) 6 B. & C. 216. The words

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ed this agreement, does not appear to have had any very clear idea of the distinction between a penalty and liquidated damages; for the sum of 500*l.* is described in the same sentence as a penal sum, and as liquidated damages. Now both expressions cannot be satisfied. We must therefore look to the whole of the agreement, in order to ascertain whether the 500*l.* was intended to be a penalty or liquidated damages; and considering the whole agreement, we think it was clearly intended as a penalty to secure such damages as the party injured ought to receive." He also cited the case of *Randall v. Everest* (b).

BEST, C. J.—The law relative to liquidated damages has always been in a state of great uncertainty. This has been occasioned by Judges endeavouring to make better contracts for parties than they have made for themselves. I think that the parties to contracts, from knowing exactly their own situations and objects, can better appreciate the consequences of their failing to obtain those objects than either Judges or Juries. Whether a contract be under seal or not, if it clearly states what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict in an action for the breach of it should be for the stipulated sum. A court of justice has no more authority to put a different construction on the part of an instrument ascertaining the amount of damages, than it has to decide contrary to any other of its clauses. Our office is to ascertain the intent of the parties, and, if not contrary to law, to carry their intent into execution. In

in that case were, "in the penal sum of 500*l.*, to be recoverable for breach of the said agreement, in any Court or Courts of law, as and by way of liquidated damages."

(b) Vol. 2, of these Reports, p. 577, *S. C.* 1 Moo. & Malk. In that

case Lord *Tenterden* said, that in actions on agreements, which are not under seal, whatever may be the expressions used by the parties, the plaintiff ought to recover such damages as, upon a view of the whole case, the Jury think fit to give, and no more.

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the present case no evidence has been adduced of the amount of damage sustained by the plaintiff. In this, and in most other cases of this sort, it would be impossible to give such evidence as would enable juries to do complete justice. The claim for damages must depend not only on things which have been done, which are difficult of proof, but on what may be done, which it is impossible to prove, on the value of the customers which the conduct of the vendor of the lease has attached to him, and what number his future conduct in the house that he has taken, is likely to draw to him. We can have no safer guide to go by in deciding on the amount of compensation for breach of contract in such cases, than that estimate which the parties, each knowing all the circumstances of the case, and anxiously taking care of their respective interests, have agreed on. I cannot subscribe to the doctrine attributed to Lord Tenterden, in *Randall v. Everest*. If it be doubtful from the terms of the contract, whether the parties mean that the sum mentioned in it shall be a penalty or liquidated damages, then I should incline to consider the clause as creating a penalty, and not giving stipulated damages. So if but one sum is mentioned, and there may be several breaches, and it is not distinctly stated that this sum is to be paid on each breach, I should hold, as the Court held in *Astley v. Weldon* (a), that the sum mentioned was to be considered only as a penalty. In this case the sum of 500*l.* is to be paid for the doing of one thing only, viz. setting up a victualling house within one mile of the house transferred to the plaintiff. It is called a *penal* sum, and I will admit that the parties considered it as something more than compensation; but they have expressly agreed that this penal sum shall be recovered as and for stipulated damages. When the defendant has so unequivocally agreed, that if he ever did what it has been proved that he did, he would pay 500*l.*, what right has he now to say that the verdict against him ought not to be to this amount? The verdict must therefore be taken for the

(a) 2 Bos. & Pul. 346.

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whole sum; but I will desire the Jury to say what damages they think, in point of fact, the plaintiff is entitled to; and if they should find a less sum than 500*l.*, I will give the defendant leave to move to reduce the verdict to the sum found by the Jury.

The Jury found for the plaintiff,
 Damages—500*l.*

Jones, Serjt., and *Hutchinson*, for the plaintiff.

Wilde, Serjt., and *Steer*, for the defendant.

[Attornies—*Robinson & Son*, and *Elkins*.]

IN the ensuing Michaelmas Term, *Wilde*, Serjt., obtained a rule *nisi*, for a new trial, which, in Easter Term, 1828, was discharged, the Lord Chief Justice observing, that it was left to the Jury, to find what damages they pleased, and he could not say that they were excessive. So that the opinion given at *Nisi Prius* was not considered by the Court.

Sittings in London, after Michaelmas Term, 1827.

BEFORE MR. JUSTICE PARK,

(*Who sat for the Lord Chief Justice.*)

PHILPOTT v. J. W. BRYANT.

Nov. 30*th*.

It is not necessary in an action against the drawer of a bill of exchange, payable *after date*, to aver acceptance or notice of refusal to accept, but proof of presentment for payment is sufficient. If a bill is accepted payable at a particular place, and the acceptor dies before it becomes due, it is sufficient, in an action against the drawer, to prove presentment at the specified place, and it is not necessary to shew presentment at the house of the deceased's representative.

ASSUMPSIT on a bill of exchange, dated the 16*th* of September, 1822, at six months after date, drawn by the defendant on his father John Bryant, and accepted by him payable at No. 18, Bishopsgate Street. The plaintiff was

the holder. The declaration stated, that the bill was in due manner presented to the drawee *for payment*.

A notary's clerk proved, that he presented the bill *for payment*, at No. 18, Bishopsgate Street, and it appeared that John Bryant, the drawee, died about a fortnight before the bill became due, leaving his widow his executrix.

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Curwood, for the defendant, objected that the plaintiff could not recover, as he had merely averred and proved presentment to the drawee *for payment*. To make the drawer liable, there must be default on the part of the acceptor; and if the drawee has not been required to accept, he cannot be guilty of default in neglecting to pay.

PARK, J.—I am clearly of opinion, that what has been done is sufficient. I should destroy half the trade of the city of London, if I were to hold, that bills made payable so many days after *date*, must be presented for acceptance as well as for payment. If they are made payable after *sight* it will be otherwise.

Curwood, then submitted, that the drawee being dead before the bill became due, the plaintiff was bound to prove presentment at the house of the executrix, because she might not be conversant of the existence of any such bill.

PARK, J.—No. I think not. It is presented where it is made payable, and I am of opinion that that is sufficient.

Verdict for the plaintiff, subject to a motion on another point.

Wilde, Serjt., and *Thesiger*, for the plaintiff.

Curwood, for the defendant.

[Attornies—*A. Clarke*, and *Eicke*.]

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Adjourned Sittings at Westminster, after Michaelmas Term, 1827.

BEFORE MR. JUSTICE BURROUGH.

Dec. 4th.

ALLISON v. HAYDON.

Admission as a member of the Royal College of Surgeons, does not entitle a man, since the stat. 55 Geo. 3, c. 194, to charge for medicines administered by him while attending a patient suffering under typhus fever.

But a surgeon may charge for medicine administered in a surgical case, where the medicine is subservient and subordinate to the discharge of his duty as a surgeon.

ASSUMPSIT.—The plaintiff was a member of the Royal College of Surgeons, but had not been in practice as an apothecary, before 1815, nor had been licensed to practise by the Apothecaries' Company. The charges were made for medicines furnished, and attendances given in the shape of calls on the defendant, who had the typhus fever, and whose house was three miles distant from that of the plaintiff. The whole of the demand had been paid with the exception of 4*l.* 14*s.* After the action had been commenced, the defendant offered to pay the balance, but objected to paying any costs.

E. Lawes, Serjt., for the defendant, submitted, that under the statute 55 Geo. 3, c. 194 (*a*), the plaintiff not being an apothecary was not in a situation to recover.

Taddy, Serjt., *contra*, contended, that as he was a surgeon, and licensed to practise as a surgeon, he was entitled to a verdict.

BURROUGH, J., was of opinion, that the words of the statute were clear against the plaintiff, and that he must

(*a*) S. 21, which enacts, that no apothecary shall be allowed to recover "*any charges* claimed by him," unless he proves on the trial that he was in practice be-

fore August 1815, or has "obtained a certificate" to practise, from the Master, Wardens &c. of the Apothecaries' Company.

therefore be nonsuited. He however gave permission for a motion to set aside the nonsuit.

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Taddy, Serjt., and *Talfourd*, for the plaintiff.

E. Lawes, Serjt., for the defendant.

[Attornies—*Salkeld*, and *Wright*.]

In the ensuing Michaelmas Term, *Taddy*, Serjt., obtained a rule *nisi* for setting aside the nonsuit, which, in Easter Term, 1828, came on to be argued.

E. Lawes, Serjt., shewed cause, and contended, that the 21st section of the 55 Geo. 3, c. 194, was decisive upon the subject, and that it was not controlled by the 28th or 29th sections of the same statute (a). He also contended, that a case of typhus fever was not a case which came regularly within the province of a surgeon, which was stated in the dictionaries to be confined to manual operations.

(a) S. 28, provides, that nothing in the act shall extend to affect the business of a chymist and druggist.

S. 29, is as follows:—"That nothing in this act contained shall extend or be construed to extend to lessen, prejudice, or defeat, or in any wise to interfere with any of the rights, authorities, privileges, and immunities heretofore vested in, and exercised and enjoyed by, either of the two Universities of Oxford or Cambridge, the Royal College of Physicians, the Royal College of Surgeons, or the said Society of Apothecaries, respectively, other than and

except such as shall or may have been altered, varied, or amended, in and by this act, or of any person or persons practising as an apothecary previously to the 1st day of August, 1815; but the said Universities, Royal Colleges, and the said Society, and all such persons or person shall have, use, exercise, and enjoy all such rights, authorities, privileges, and immunities, save and except as aforesaid, in as full, ample, and beneficial a manner, to all intents, and purposes, as they might have done before the passing of this act, and in case the same had never been passed."

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Taddy, Serjt., in support of the rule.—The 29th section excepts the College of Surgeons from the operation of the act. The business of an apothecary is to sell drugs and medicines, and not to attend people when they are ill. The balance is claimed for attendances, and not for medicine. All the medicine has been paid for. The statute intends that the superior degree of a surgeon shall be subject to the College of Surgeons, and the inferior degree of an apothecary to the control of the Apothecaries' Company, but it was never intended that a regularly qualified surgeon should not be allowed to act both as a surgeon and apothecary. It has been said from the Bench, that an apothecary cannot charge for attendances. The question is, does the word apothecary in the act of Parliament, apply to a surgeon who furnishes medicines. It would be subjecting surgeons to a very degrading necessity, if they were required to undergo an examination at Apothecaries' Hall. An apothecary is a person selling medicines generally without attendances, not a person who merely supplies them in the particular cases which he attends.

PARK, J.—I take it that an apothecary is not merely to make up medicines, he is to have a certain portion of competent skill for the administering of them. There are four degrees in the medical profession, physicians, surgeons, apothecaries, and chymists and druggists.

GASELEE, J.—May not the exception in the statute be complied with by applying it only to matters ancillary to surgical practice. There may be some small medicines necessary in the case of a manual operation, which a surgeon would be justified in administering.

BEST, C. J.—I have a great respect for the medical profession, and should be sorry to lay down any rule which had a tendency to injure any branch of it. In my opinion,

we best consult the honour of this profession, and, what is of higher importance, we secure the health of the people, by strictly enforcing the laws which provide, that those who practise any branch of this art, should be regularly educated in that branch. I cannot agree with my Brother *Taddy*, that the Legislature intended to give to surgeons, on account of their superiority to apothecaries, the privilege of practising in physic as well as surgery, nor can I accede to the statement of my Brother *Lawes*, that the business of a surgeon is confined to manual operations. The exception in this statute, which, it has been insisted, authorizes surgeons to practise physic, only allows them to administer medicines in surgical cases. For some disorders, relief is sought from medicine, for others, from topical applications. A different education is necessary to prepare men to undertake the cure of either of these different descriptions of complaints. To attain a proper proficiency in either branch, requires undivided attention. The first description belongs to the physician and apothecary, the second to the surgeon. The professors of each branch of medicine must sometimes go beyond their proper limits. It may be necessary for the apothecary to use the lancet, and the surgeon to administer medicines, either to prevent the necessity of an operation, to prepare the patient for it if necessary, or to recover him from its effects if performed. In these cases, the apothecary cannot be considered as infringing the laws made for the regulation and protection of surgeons, or the surgeon such as relate to the apothecary. The exception relied on by the plaintiff's counsel, was introduced into this act to protect surgeons in such cases, and in such cases only. In some neighbourhoods, there is not sufficient business to support both a surgeon and an apothecary. The same person must, in such places, act in both characters; and from the necessity of the case, patients must be satisfied with the skill and knowledge in each, which such a practitioner can acquire. In these cases the practitioner must be edu-

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cated as a surgeon, and as an apothecary, and before he is permitted to practise, he must obtain certificates of his competency from the proper authorities in each profession. The plaintiff has no license from the Apothecaries' Company to practise as an apothecary. The malady he undertook the cure of was a typhus fever, which is not a disease that belongs to the surgeon's branch of medicine, and he cannot therefore recover for his attendances on a patient suffering under it.

PARK, J.—It appears to be the object of the Act of Parliament to keep the practice of an apothecary distinct from any other. The title of the act is "An Act for better regulating the practice of Apothecaries throughout England and Wales." A chymist could not recover for advice and administering medicine. It appears to me that this plaintiff, being only a surgeon, was called in to act as an apothecary, and is not in a situation to recover.

BURROUGH, J., concurred.

GASELER, J.—I believe that in point of fact, when persons act in the capacity of both surgeon and apothecary, they are examined both at Surgeons' and Apothecaries' Hall.

Rule discharged.

Dec. 8th.

DOBREE v. EASTWOOD.

If a letter, giving notice of the dishonour of a bill, is put into the two-penny post-office, in time to be delivered on the proper day, in the ordinary course of business, but, from some delay in the office, does not reach its destination till afterwards, such delay in the office will not prejudice the party by whom the notice was given.

If there are several indorsers of a bill, and the last indorsee and holder resorts in the first instance to the first of such indorsers, he is not entitled to as many days as there are indorsers to give notice of dishonour in, but must give it within the same time as he would have been obliged to do it in, if he had resorted at first to his own immediate indorser.

ASSUMPSIT on a bill of exchange for 100*l.* drawn by the defendant, and indorsed by him to Lawford, by Law-

ford to Pope, by Pope to Parker, and by Parker to the plaintiff. According to the evidence at the trial, it appeared, that the bill became due and was dishonoured on the 27th October, 1826. A witness proved, that on the 28th, which was a Saturday, he put, on the part of the plaintiff, a notice of the dishonour in the two-penny post, in Berners Street, Oxford Street, directed to the defendant, at Belvidere Wharf, on the Lambeth side of Westminster Bridge. He stated that he put it in the post about 5 or 6 o'clock in the evening. One of the post marks on the letter was of the date of the 30th.

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Wilde, Serjt., for the defendant, contended that the notice was not sufficient. It ought to have been so given as to reach the party to whom it was addressed, on the 28th, and the post mark of the 30th shews, that it was not delivered till that day. The principle is this, that a party in a case like the present, where the residence of the drawer is so near, may either send a special messenger, or use the two-penny post, but if he chooses to use the post instead of the special messenger, he must take care so to use it, that the party to whom he is sending may not be delayed by it. He cited *Smith v. Mullett* (a), and *Lawson and Another v. Sherwood* (b).

BURROUGH, J.—Supposing the letter to have been put into the post on the 28th, early enough to be delivered on that day in the ordinary course of business, but that from some delay in the office it was not delivered till the 30th,

(a) 2 Camp. 208. That was an action by the fourth against the first indorsee of a bill, all the parties lived in London; the plaintiff received notice of dishonour on the 20th, and gave notice to his immediate indorser on the

21st, by a two-penny post letter, which was put in so late in the evening, that it was not delivered till the 22nd, and it was held that the notice was not sufficient.

(b) 1 Stark. 314.

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I apprehend that the fault of the post-office is not to prejudice the plaintiff.

Wilde, Serjt.—It is to be presumed, that the post-office does its duty regularly, as a public office, and it is upon this supposition that the sending a letter by the post is evidence of notice at all.

E. Lawes, Serjt., and Curwood, for the plaintiff.—The notice was clearly in time on the 30th. The defendant was fourth indorsee, reckoning from the plaintiff the holder. All the plaintiff was bound to do was to give notice to his immediate indorser on the next day after the dishonour, but not to the defendant who stood four off from him. He was entitled to time for inquiring as to the residence of a person who was not his immediate indorser. They cited *Scott v. Lifford (a)*.

Wilde, Serjt.—The case of *Scott v. Lifford* is mentioned in the case I cited, and ruled not to apply.

The witness was then called up again, and said that he put the letter into the post-office *before 5 o'clock*.

BURROUGH, J.—I will leave it to the Jury to say whether the letter was put in early enough to reach the defendant on the 28th.

Wilde, Serjt., then addressed the Jury.—If the holder of a bill applies to his immediate indorser, that immediate

(a) 1 Camp. 246. This case, *inter alia*, decided, that where a bill of exchange, all the parties to which resided in the same town, became due on the 4th, when it was presented for payment by the payee's bankers, and returned to

him dishonoured on the 5th, a letter sent by him to the drawer on the 6th, giving notice of the dishonour, was in time. This point was confirmed in banc. See 9 East, 347.

indorser has a day to give notice to his immediate indorser, but if the holder chooses, in the first instance, to apply to the drawer, he is not to have as many days as there are indorsers, to give his notice in, but must give it within one day, as he would have been obliged to do, if he had applied to his immediate indorser. The law presumes that all public offices discharge their duty properly, in the absence of proof to the contrary. And it is so with respect to the post-office. The plaintiff is bound to prove that the letter was put in at such a time as would cause it, in the regular course of business, to be delivered on the 28th. But the post-mark shews that it was *in the office*, at some part of the day on the 30th. What ground is there for supposing that the post-office did not do its duty in this particular instance? I submit that, under all these circumstances, the defendant is clearly entitled to a verdict.

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BURROUGH, J.—The holder of a bill may, when it has been dishonoured, either resort to his immediate indorser, and then he must give him notice within the proper time, or he may resort to the drawer, and then he must give him notice within the same time. It is not that the holder of the bill has as many days as there are indorsees, but that each indorser has his own day (*a*). If the letter was put into the post-office at such an hour on the 28th as that it could be delivered in the course of that day, then the notice will be sufficient, otherwise it will not.

His Lordship then left the question to the Jury, who stated it as their opinion, that, if the letter was put in on

(*a*) In *Marsh v. Maxwell*, mentioned in a note in page 210, of 2 Camp. Lord *Ellenborough* held, that, upon the dishonour of a bill, it is not enough that the drawer

or indorser receives notice in as many days as there are subsequent indorsees, unless it is shewn that each indorsee gave notice within a day after receiving it.

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the 28th, it was not put in in time to reach the defendant that night, and found their

Verdict for the defendant.

E. Lawes, Serjt., and *Curwood*, for the plaintiff.

Wilde, and *Andrews*, Serjts., for the defendant.

[Attornies—*Willis*, and *Rogers & Son*.]

IN the ensuing Hilary Term, *E. Lawes*, Serjt., applied to set aside the verdict, and the Court granted a rule, which, on another point distinct from those decided at *Nisi Prius*, was made absolute for a new trial.

Dec. 15th.

RADBURN v. MORRIS and Another.

IN an action of trover, for a barge, brought against barge builders, who claimed under a person named Wilson, who had put it into their custody for repairs, and who made title under a purchase from a person named Buckman, who was alleged by the plaintiff to have previously sold to him.—Buckman was called as a witness on the part of the defendants:—Held, that a release from Wilson was sufficient to render him competent, and that a release from the defendants was unnecessary.

TROVER for a barge called the *Thomas*. The plaintiff's title rested on a purchase from a person named Buckman. To prove the payment of part of the purchase-money, a receipt by Buckman for it was put in, and his handwriting proved by the attesting witness.

Bompas, Serjt., for the defendant.—As against third persons the receipt is not evidence. It is a mere declaration of Buckman at the time, and he ought to be called as a witness.

BURROUGH, J., was of opinion, that the receipt was admissible.

The defendants were barge builders, and claimed the barge under a person named Wilson, who was alleged to have subsequently bought of Buckman (the barge having been allowed by Radburn to remain in his possession), and who had put it into their custody for repairs.

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Bompas, Serjt., for the defendants, called Buckman as a witness, for the purpose of supporting their claim to the barge.

Wilde, Serjt., for the plaintiff, objected to him as incompetent.

Bompas, Serjt., referred to *Nix v. Cutting* (a), and *Ward v. Wilkinson* (b), and he contended that the witness stood indifferent, as he would be liable over to the plaintiff, if the defendants succeeded, and to the defendants, if the plaintiff should have a verdict.

Wilde, Serjt.—The witness is called to impeach the sale to the plaintiff. If there should be a verdict against the defendants, then this record would be evidence against him, in an action by the defendants, of the amount recovered; as in the instance of servants and masters in cases of negligence. It would not be evidence of the circumstances but of the amount of the verdict. *Bland v. Ainsley* (c). The plaintiff says the witness sold the barge to

(a) 4 Taunt. 18. That case decides that in trover for a horse, a witness is competent to prove that the plaintiff agreed that he (the witness) should take the horse as a security, and sell it, if the plaintiff did not pay him by a certain day, and in consequence of which he did sell it to the defendant; because the verdict obtained on his evidence will not avail him in any

action to be brought by the plaintiff against him.

(b) 4 B. & A. 410. In trover by A. against B., C. is a competent witness to prove property in himself.

(c) 2 N. R. 331. That case decides, that in an action of trespass against the sheriff, for taking the goods of A. in execution for the debt of B., where the question is,

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him. The defendants say, he did not. Suppose the plaintiff fails in his action, the verdict will prove nothing for him: it will not be evidence against the witness. But it will be evidence for the defendants if the plaintiff should recover.

BURROUGH, J.—This man has sold what was said to be his own property to the plaintiff, and now he has come to say that it was not his property. I am clearly of opinion that he cannot be received to give the evidence proposed. It seems to me quite clear, that, in the event of the verdict being for the plaintiff, the record would be evidence of the amount of the damages recovered.

A joint and several release to Buckman by Wilson, and the defendants, was then tendered by *Bompas*, Serjt.: it contained only one stamp.

Wilde, Serjt., objected that it was not sufficient, as the different parties had distinct interests.

BURROUGH, J.—As far as we can see now, these parties have distinct interests, which it will require separate deeds to release.

Bompas, Serjt.—Where the release applies to one and the same transaction, though it is by different persons, one stamp is sufficient. This is one transaction alone, and the release applies to it. The case of creditors, where it is admitted that one general release will do, is in point in the present case.

Wilde, Serjt.—This is a general release of all claims by the particular parties respectively, and is not in respect of any thing which shews a community of interest. In the

whether the goods had been previously assigned by B. to A. or not; B. is not a competent witness to disprove the assignment to A.

case of creditors, the mutuality of the release creating the consideration makes the distinction.

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The witness was then rejected, and other evidence was given, but in the progress of the case, another release was tendered, which was executed by Morris only, (the other defendant not being then present). This, it was contended, would operate as a release by both, they being in partnership.

Wilde, Serjt.—Tort feazers cannot claim contribution. The defendant, who has not signed, may have execution levied individually on him, and he must therefore individually release to the witness.

BURROUGH, J., thought that the release would not do.

A separate release by Wilson was also put in, but objected to as not sufficient, and the objection allowed.

The case went on, and terminated eventually in a

Verdict for the plaintiff.

Wilde, Serjt., and *Ryland*, for the plaintiff.

Bompas, Serjt., for the defendant.

[Attornies—*B. Lewis*, and *Ridout*.]

IN the ensuing Hilary Term, a rule *nisi* for a new trial was obtained, on the ground that the witness ought to have been received. This rule came on to be argued in Easter Term.

In shewing cause against it, it was contended that the witness was not indifferent, as he had a stronger interest in the success of the defendants, than in that of the plain-

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tiff, because, if the plaintiff succeeded, the defendants might recover against Wilson, the value of the barge and the costs of one action; and Wilson could recover against the witness, the value of the barge and the costs of two actions; whereas, on the contrary, if the defendants succeeded, the witness would only be liable to the plaintiff for the value of the barge. The cases of *Adamson v. Jarvis* (a), *Piesley v. Von Esch* (b), and *James v. Hatfield* (c), were cited. The objections made at *Nisi Prius*, to the releases, were also repeated.

In support of the rule it was argued, that the interest of the witness, if any, was too remote to render him incompetent, and therefore there was no necessity for any release at all. The cases of *Abrahams v. Bunn* (d), and *Carter v. Pierce* (e), were relied on.

The Court did not positively decide whether any release was necessary, but they were clearly of opinion, that as Wilson was the only person who could sue the witness, in the event of the plaintiff's having a verdict, the release from him was quite sufficient, and any release from the defendants was altogether unnecessary. Therefore the rule for a new trial was made

Absolute.

(a) 4 Bing. 66.

(b) 2 Esp. 606.

(c) 1 Str. 548.

(d) 4 Burr. 2254.

(e) 1 T. R. 164.

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*Adjourned Sittings in London, after Michaelmas
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BEFORE MR. JUSTICE GASELEE.

ROBERTSON v. MACDOUGALL.

Dec. 21st.

LIBEL.—The declaration stated, that before the time &c., the defendant made his certain bond &c., by which he became bound to the plaintiff and another, in 1000%, and that the plaintiff being desirous of selling his interest in it, caused it to be put up to auction by one C. L. Hoggart, yet the defendant well knowing, &c., and contriving to injure, &c., and to cause it to be suspected, that the plaintiff had been guilty of misconduct, &c., and that he had no interest in the bond, and that nothing was due on it, and that it was of no value, and for the purpose of hindering him from selling it, published a certain libel concerning the plaintiff and the bond, &c., in which was contained the following matter, &c. [Here the libel as stated in the account of the facts, was set out.] The declaration, in concluding, averred, that the plaintiff, by reason of the premises, had been greatly injured in his credit, and that many persons were prevented by the libel from bidding for the bond, who would otherwise have done so.

The defendant pleaded the general issue, and several special pleas, which it is not necessary to set out, as no evidence was given upon them.

The facts were as follow :—The defendant, as surety for one Morrison, had entered into a bond for the perform-

In an action for a libel, contained in a printed paper, circulated in a sale room, previous to the sale of an arbitration bond given by the defendant to the plaintiff as a surety for a third person, and which was advertised as an ordinary money bond, pending a writ of error and a suit in equity,—it appeared, that the printed paper charged the plaintiff with an intention of extorting money by threats, and spoke of the sale as a “wicked expedient.”

And it also appeared, that the plaintiff, before the writing of the paper, said, on the refusal of the defendant to pay him a certain sum, which he de-

manded, that he would advertise the bond, and the defendant should see the advertisement under his nose at breakfast. It was left to the Jury at *Nisi Prius*, to say whether, under all the circumstances, the defendant was acting *bond fide*, and the objectionable remarks were relevant, and exceeding only from warmth of feeling the bounds of moderation, or whether they were wholly irrelevant, and he went out of his way purposely to slander the plaintiff. The Jury found for the defendant; but the Court of Common Pleas granted a new trial, on the ground, that the defendant's expressions went far beyond the limits of a privileged communication, and must be considered as clearly libellous, without any proof of express malice.

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ance of a deed of submission to arbitration of matters in dispute between him and the plaintiff. The deed contained a proviso, that the arbitration should continue to go on, notwithstanding the parties who made the submission should die during its progress. Morrison died in September, 1823, and the defendant gave notice to the plaintiff's agent, that he considered himself discharged from his suretyship. After this the arbitration went on, and an award was made, and proceedings were taken upon the bond, and judgment obtained in the King's Bench, in the month of January, 1827. The defendant brought a writ of error in the Exchequer Chamber, and filed a bill in equity; and pending these proceedings, the plaintiff applied to Mr. Hoggart, an auctioneer, to put up the bond to auction. Mr. Hoggart wrote to the defendant, to inform him of the intended sale. The defendant, in reply, sent the following letter :

“ 11th April, 1827.

“ Sir,—I have to acknowledge the receipt of your favor of this date, and have to thank you for the courtesy of the communication. I have no doubt you know me well enough to be assured, that if I owed to Mr. Robertson any money on bond, there would be no occasion for him to resort to the wicked expedient he is now attempting. His object is, either to extract money out of the pocket of an unwary purchaser, or, what is more likely, by means of this threat of publication, to extort money from me. That the bond is not worth one farthing, is clear to demonstration, and as there is an existing suit in equity to set it aside, I imagine you will not think you acquit yourself properly to the public, without you add to the advertisement for the sale that there is a suit in dependence. You ask me, whether I would choose that the bond should go into the market? I have no means of preventing your carrying into the market an article of no value; but if, by your putting to me the above question, you meant that I should offer to become the purchaser, I have only to add, that if you

were to offer it me for 10*l*. I should hesitate about accepting the offer. I am, &c.

A. Macdougall."

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The defendant, on the day of sale, caused to be circulated in the sale room, a printed paper in the following terms, which paper was the libel complained of:—

"The 1000*l*. bond, advertised for sale, by Mr. Hoggart of Broad Street.

"The above is advertised as if it were a money bond of a responsible gentleman; and how Mr. Hoggart can reconcile it to his character to suppress the facts, with which he was perfectly acquainted, is for him to explain. The short circumstances are these:—Mr. Æneas Morrison, of Glasgow, now deceased, and John Robertson, of London, recently a bankrupt, had occasion to refer to arbitration certain disputed accounts; each party procured a friend to enter into a surety bond in 1000*l*., for the due performance of the award to be made. Pending the arbitration, Mr. Morrison died, and intimation was given that the surety considered himself discharged. Mr. Robertson, however, forced the matter to proceed, and the arbitrators having differed, he procured from an umpire an award in his own favour. Proceedings have been instituted in equity in this country, and also Scotland, to set aside this award, and of course to have delivered up to be cancelled the bond of the surety for the performance of it. This is the very bond now offered for sale! The following letter will shew that Mr. Hoggart was perfectly aware of the circumstances previously to advertising it. [Here was added the letter of the 11th of April, as above.]"

It appeared that the plaintiff had said, in consequence of the defendant's having refused to agree to certain terms of negotiation, in which the plaintiff had demanded 1,250*l*., "I will advertise the bond, and he shall see the advertisement under his nose when he comes to his breakfast." This observation came to the defendant's knowledge before he wrote the letter to Mr. Hoggart. The bond was advertised in this form:—"The bond of Alexan-

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der Macdougall, Esq., Solicitor. On &c., at &c., by Mr. Hoggart. The bond of the above respectable gentleman for 1000*l.*, on which the judgment of the Court of King's Bench has been obtained, but payment of which may be put off by Mr. Macdougall for about twelve months longer, &c."

GASELEE, J., to the plaintiff's counsel.—What is the nature of this libel? it seems to me, to be the greatest part of it slander of title.

Spankie, Serjt., for the plaintiff.—We proceed upon *personal* slander, and I submit that, for that, we are entitled to recover. I allow that the law is very tender where a man, having a *bond fide* claim, sets it up against another made under circumstances in which a reasonable man, though mistaken, might fairly oppose it. But that will not justify slander of the person. If a man mixes up the assertion of his claim with personal slander of his opponent, the law gives him no indulgence. He has no right to make insinuations against the character of the individual. The defendant in this case insinuates, that the plaintiff is no better than a swindler; and that is not slander of title, but clearly slander of the person. He charges him with an intention to extract money from the pockets of an unwary purchaser, or to extort money by means of threats from him.

GASELEE, J.—The only question that can be left to the Jury, will be, whether these insinuations were meant to impute improper motives to the plaintiff, or whether they arose naturally out of all the circumstances of the case.

Wilde, Serjt., for the defendant.—The defendant's notice was moderate, such as it was his duty as an honest man to give. The plaintiff had no right to put up the bond to sale. The sale was wholly illegal and void, and no contract for it would be binding on the purchaser. The

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law says, that a man shall not sell a pretended claim, because, if such claims were saleable, rich men might buy them up (a). Macdougall was advised, whether rightly or not is immaterial, that the bond was void. Should he, under such circumstances, permit the sale to take place without doing any thing? There is no proof of publication anywhere but in the sale room. It is manifest, that the defendant had an interest in the subject matter. There is scarcely a case in which slander of title is not mixt up with personal slander. There is the case of the adulterated beer, where the plaintiff was charged with being a cheat; and the case in which the counsel accused the attorney of dishonesty. In *Pitt v. Donovan* (b), Lord *Ellenborough* says, "if what the defendant has written be most untrue, but nevertheless he believed it, if he was acting under the most vicious of judgments, yet, if he exercised that judgment *bona fide*, it will be a justification to him in this case." In the same case, speaking of the defendant's conduct, he says, "but the question does not turn upon his conduct; and this is a case, the decision of which is to govern other cases where the question of slander of title may occur; in which case the *bona fides* of the communication, and not whether a man of rational understanding would have done so and so, is the question." If Juries hold too tight a rein upon language in cases like the present, it will go to prevent men from asserting their rights at all. The plaintiff advertised the bond, as free from all objection; and that was not a fair advertisement, but might be considered as inserted for the purpose of taking in the unwary. The words lead to the conclusion that the bond was a money-bond, not subject to any condition, and that delay was the defendant's only object. The defendant wrote the letter originally to Hoggart, and did not intend at first to publish it. No evidence has been given to shew that Macdougall

(a) 15 Vin. tit. "Maintenance," pl. 29. Godb. 81.

(b) 1 M. & S. 639.

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was running about circulating slanders on the plaintiff, or that he was actuated by malice or by any other motive than that of preventing the sale. Though there may be excess in his expressions, yet he will be justified if that excess be relevant to the subject matter. He cited also *Hargreave v. Le Breton* (a).

GASELEE, J., (in his address to the Jury, said)—The material question for you to consider is, whether the particular paragraph complained of is a libel or not, whether it is intended to impute misconduct or fraud to the plaintiff. There are very few cases of actions for slander of title, but it is quite settled, that there must be malice either express or implied. If the party does not do what he does with a malicious view to injure the individual, it will not be material, though what he says should turn out not to be strictly true. In *Hargreave v. Le Breton*, the message was not strictly complied with, yet the Court held, that it was not such a variance as to furnish the ground of an action. Let us look at the facts of the present case. There is a bond, not a money-bond, but a bond for the performance of an award. The deed of submission is recited in the bond, and in that deed there is a clause providing that the arbitration shall continue, though the parties to the submission die. Whether such a proviso is valid or not is not a question to be discussed to-day. It has been decided, in several cases in the King's Bench and Common Pleas, and in the Exchequer Chamber between the pre-

(a) 4 Burr. 2422. In that case the slander of title complained of, consisted of a message delivered by the defendant, an attorney, as coming from his client. It appeared that the defendant had exceeded his authority, and added an observation which he was not instructed to make. Two questions were raised, *first*, whether

the action would have lain if the attorney had delivered the message precisely in the client's words; and the Court were clearly of opinion that it would not: and *secondly*, whether the variation he made from those words would subject him to it; and upon this the Court thought the variation was not a material one.

sent parties, that it is (a). We may take it for granted, as the law stands at present, that the award which has been made is good. But yet that law may be altered by the House of Lords. The question has been discussed for the first time within these few years. I am not prepared to say, or desire you to say, that a man who defends on such objections is defending upon frivolous grounds. Unless you are satisfied that all this was for delay, Macdougall not thinking that he had any real defence, I am of opinion, that he was *justified* in the course he took of giving notice at the sale. It is enough to say this, without going out of the case to say whether it was his *duty* or not. If the bond were a money bond, the delay no doubt would be frivolous; but on looking at the nature of this bond, I do not think that Mr. Macdougall's delay was at all of that character. There has been a case lately, where a decision was suffered to proceed through all the courts, and was at last overturned in the House of Lords (b). In the declaration, the bond is stated as an absolute bond for 1000*l*. It appears that the letter complained of was written to Hoggart in answer to one from him. The words "wicked expedient," might certainly as well have been omitted. The plaintiff's expression about the defendant's having the advertisement under his nose, must mean this—if you do not pay me what I ask, I will expose you. Therefore, we must make reasonable allowance for the expressions used by the defendant in a letter written after such an observation. The arrangements for the sale went on notwithstanding the letter, and Macdougall had a right to go to the sale and state to the parties what had taken place. The first part of the paper, which he circulated there, seems rather a reflection on Mr. Hoggart, than on the plaintiff. Before publishing the letter, the defendant ought certainly in strictness to have expunged those parts

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(a) For the arguments and decision in the Exchequer Chamber, see 1 Moore & Payne, 147.
(b) *Fletcher v. Lord Sondes*.

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about extracting and extorting money. . But it is for you to say, whether he intended, by the use of them, to impute fraud to the plaintiff. If you think, under all the circumstances, that the defendant was acting *bond fide*, and that the objectionable remarks were relevant to the subject in hand, and exceeding the bounds of moderation only from warmth of feeling, then I am of opinion that you should find your verdict for him; but if, on the other hand, you consider that the expressions were totally irrelevant, and that the defendant went out of his way for the purpose of slandering the plaintiff, then I am of opinion that your verdict should be for the plaintiff.

Verdict for the defendant, on the general issue.

The Jury were discharged from giving any verdict upon the special pleas.

Spankie, Serjt., and *Hutchinson*, for the plaintiff.

Wilde, Serjt., *Manning*, and *Henderson*, for the defendant.

[Attornies—*Willis & Co.*, and *in Person*.]

IN the ensuing Hilary Term, *Spankie*, Serjt., obtained a rule *nisi*, which in Easter Term was made absolute, for a new trial; the Court being of opinion, that the defendant's expressions went far beyond the limits of a privileged communication, and must be considered as clearly libellous, without any proof of express malice.

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Further Adjourned Sittings in London, after Michaelmas Term, 1827.

BEFORE LORD CHIEF JUSTICE BEST.

ROUTLEDGE v. GRANT.

Jan. 18th.

ASSUMPSIT.—The *first* count of the declaration stated, that at the time of the promise by the defendant &c., the plaintiff was lawfully possessed for the residue of a certain term of years, to expire on the 25th of December, 1856, of a certain dwelling house &c., and thereupon, theretofore, to wit, on the *29th day of April, 1825*, by a certain agreement then and there made between him and the defendant, it was agreed that the defendant should pay a premium of *2,750*l.**, upon receiving a lease of the said premises for twenty-one years &c., with the option, upon giving six months' notice, of having the time extended to thirty-one years &c., and that by the said agreement possession was to be given on or before the 25th day of July then next &c., as by the said agreement &c., would more fully appear. It then averred mutual promises, and that, up to the 6th day of April, the plaintiff was ready to grant a lease pursuant to the terms of the agreement, but that the defendant then and there discharged him from it. It afterwards averred a sale by auction of the premises, and a loss in consequence of *2,230*l.**, which it alleged the defendant was liable to pay.

A. proposed to B. to give him a certain sum for a *thirty-one years' lease* of a house, with possession on the *25th of July*, and a definitive answer was to be given within six weeks. B. about three weeks after the proposal wrote that he accepted it, and would give possession on the *1st of August*. A. in a few days wrote, withdrawing his proposal. Some time after this, and just before the end of the six weeks, B. wrote that it was by mistake he had offered possession on the *1st of August* and stating that he was ready to give it according to the

proposal:—Held, at *Nisi Prius*, that the letter of B. offering possession in August, was not an acceptance of A.'s proposal, and that A. had a right afterwards to retract his offer, and having done so, the second letter of B. amending the offer of possession, was too late.

The declaration in the first and third counts alleged the possession of the whole interest by B., and in the second, the possession of a contract for it. It appeared that there had been some conversation between B. and the owner of the freehold, about granting a thirty-two years' lease, but there was no written contract, nor did it appear that there was any positive verbal agreement upon the subject. The only interest which B. had in the premises, at the time of the proposal and retraction was a ten years' interest:—Held, both at *Nisi Prius* and in Bank, that there was a material variance between the declaration and the proof.

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The *second* count stated that at the time &c., the plaintiff was entitled, under and by virtue of a certain contract, to a certain term of thirty-two years from the 25th day of December, 1824, of a certain dwelling-house &c., which was contracted and agreed to be granted to him by one J. A. Hermon, who then and there had lawful authority in that behalf; and that afterwards, to wit, on the 18th day of March, 1825, the defendant proposed and agreed to pay a premium of 2,750*l.*, upon receiving a lease for twenty-one years, with the option &c.; and that a definitive answer to such proposal should be given by the plaintiff within six weeks from the time of making the said agreement. It then averred, that the plaintiff, within the six weeks, to wit, on the 29th day of April, returned a definitive answer, that he acceded to it. It then further averred the granting by Hermon, within the six weeks, of a lease to the plaintiff for thirty-two years, &c.

The *third* count was nearly similar to the first. It averred the tender of a lease, and the defendant's refusal to accept it and to pay the premium. There were the usual money counts; and the plea was *non assumpsit*.

It appeared that the defendant, being desirous of treating for the purchase of a house in Saint James's Street, on the 18th of March, 1825, having previously had a conversation with the plaintiff on the subject, made him this proposal in writing:—

“ To pay a premium of 2,750*l.*, upon receiving a lease for twenty-one years, with the option, upon giving six months' previous notice to the landlord, of having the time extended to thirty-one years, paying the same yearly rent as before, for such further time; rent, 250*l.* Mr. Grant to take the fixtures at a valuation. *Possession to be given on or before the 25th of July next*; to which time all taxes and outgoings are to be paid up by Mr. Routledge; and a definitive answer to be given within six weeks from *this 18th of March, 1825.*”

On the 6th of April, the plaintiff sent the following letter in reply:—

“ Mr. Routledge begs to say that he *accepts* Mr. Grant's offer for his house in Saint James's Street, and that he will *give Mr. Grant possession on the 1st of August next*.

“ Mr. R. will esteem it a particular favour, if Mr. Grant will not mention the subject to any one.”

On the next day the defendant wrote to the plaintiff as follows:—

“ Arlington Street, 7th April, 1825.

“ Sir,—I received your note last night, and hasten to acquaint you, that having considered as confidential the negotiation respecting your house, I had mentioned it to no one; but upon consulting with a friend this morning, in whose opinion I place more confidence than in my own, I am advised, for some reasons that had not occurred to myself, not to think of taking a house in Saint James's Street, for a dwelling-house. May I therefore request you will permit me to withdraw the proposal I made to you about it. I am in hopes you will make no hesitation to do this, when you consider the spirit of candor and openness in which it was made to you; but should it be otherwise, I am one of the last that would willingly act with inconsistency, or be considered capable of doing an improper act. I will willingly refer the question to friends for their decision, and abide by their opinion of the case. I am &c.,
A. Grant.”

To this letter the plaintiff sent the following answer:—

“ 8th April 1825.

“ Sir,—In answer to your letter of yesterday, I beg to state, that, relying upon your performing the agreement for the purchase of my house in Saint James's Street, I have taken another house, and made arrangements, which I cannot, without great loss, relinquish. I hope therefore that you will not wish me to withdraw it. I am &c.

Thomas Routledge.”

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This gave rise to the following letter from the defendant in reply:—

“9th April, 1825.

“Sir,—Your note of yesterday surprised me, being altogether at variance with your conversation with me, two or three hours previous to your note, dated on the evening of the 6th, in which you must recollect, you one moment declared yourself off, and finally you went away to have the opinion of Mrs. Routledge, about the answer you were to send me. How, therefore, you can, under such circumstances, suffer loss and inconvenience, from my declining to proceed further in the treaty, I am at a loss to imagine: and I was in hopes you would have been satisfied with what I had stated in reply to your first note, to have had the liberality of letting the matter drop. But if that should not be your intention, I have only to add, that you may proceed with your claim for “loss and inconvenience,” as you may think most advisable. I am &c.

Alexander Grant.”

Some further correspondence took place between the parties and their attornies, and on the *29th of April* the plaintiff wrote to the defendant as follows:—

“Sir,—Upon referring to my letter to you of the 6th instant, accepting your offer for my house, No. 59, Saint James's Street, I perceive that I, by mistake, stated, that I will give you possession on the 1st of August next. By your offer you state, that possession is to be given on or before the 25th of July next; and I now inform you that I am ready to give you possession according to your proposal.”

The plaintiff had not, at the time of the proposal, viz. 18th March, 1825, more than *a ten years' interest*, in the premises, but he subsequently obtained a lease for thirty-two years from the owner of the freehold, which was dated the *21st of April*.

It appeared from the evidence of the landlord, that, previous to the granting of this lease, some conversation respecting it took place between the plaintiff and him, but no written contract was entered into, nor did it appear, that there was any positive verbal agreement upon the subject. It was admitted, that a draft of a lease, according with the terms of the proposal, and also the key of the house, were sent to the defendant on the 25th of July, and that they were returned by him on the following morning. The premises were sold by auction, and fetched only 520*l*.

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Taddy, Serjt., for the plaintiff.—The six weeks mentioned in the proposal apply only to the plaintiff and not to the defendant. The words must mean, I am bound by this offer, if you accept it within six weeks. The defendant was bound during the whole six weeks, and the plaintiff was to have that time for consideration. In the defendant's letter of the 7th of April, he does not allude to the difference between the 1st of August and the 25th of July. But, if he had, it would not have made any difference, for, within the six weeks, *viz.* on the 29th of April, the plaintiff offered possession, according to the terms of the proposal. The case nearest in point is that of *Adams v. Lindsell* (a).

Wilde, Serjt., for the defendant.—The ground of decision in *Adams v. Lindsell* is, that till acceptance there is a continuing offer; but if there be an express rescinding of the offer, then it is not continuing. Before the plaintiff had accepted the defendant's proposal, the defendant had

(a) 1 B. & A. 681. A. by letter offered to sell B. certain specified goods, receiving an answer by return of post. The letter being misdirected, the answer notifying the acceptance arrived two days later than it ought to have

done. On the day following that on which it would have arrived, if the original letter had been properly directed, A. sold to a third person:—Held, that there was a binding contract from the moment the offer was accepted.

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a right to withdraw it; and the plaintiff's letter, written on the 6th of April, cannot be considered an acceptance, as it offers possession at a different time to that which is stated in the proposal. The learned Serjeant cited the case of *Payne v. Cave* (a). He also contended that there was a variance between the interest alleged in the declaration and that which the plaintiff was possessed of.

BEST, C. J.—What had the plaintiff to sell on the 18th of March. He could not grant a lease for thirty-one years, for he had then only an interest for ten years.

Taddy, Serjt.—It is not necessary that a party should always be ready with his title.

BEST, C. J.—At the time of the retraction by the defendant, you had not the lease for thirty-one years. The lease is dated the 21st of April; and, before that time, namely on the 9th, the defendant had withdrawn his proposal.

Taddy, Serjt.—The proposal does not suppose that we actually had the thirty-one years' term, but merely that we had the power of obtaining it; and that we had that power, is shewn by the fact that we did afterwards obtain it. If it is to be said, that the contract is defeated, because we had not the title at the precise moment, then there are few contracts that might not be put an end to.

Jones, Serjt., on the same side.—This is not a case of fraud. The question is, whether the party must have, at the moment, the complete and consummate technical title, which he contracts to communicate. I submit that he need not. All that is required, is, that he should be able

(a) 3 T. R. 148. That case decides that a bidder at an auction may retract his bidding at any time before the fall of the hammer.

to fulfil his contract at the time appointed for its execution. There would be danger in almost all titles, on account of incumbrances, trusts &c., if it were held, that the strict legal estate must be in the party at the time of the contract.

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BEST, C. J. (stopping *Wilde*, Serjt.)—It is not necessary for me to decide whether the letter of the 7th of April be a repudiation of the contract by the defendant, or only amounts to a request to be relieved from it. In the letter of the 9th of April, the defendant unequivocally declares, that the bargain is at an end, and defies the plaintiff to proceed for any compensation that he may think himself entitled to. The defendant, on the 9th of April, had a right to retract his offer, it not having been at that time accepted by the plaintiff. The offer was on the condition that possession should be given *on or before the 25th of July*. The answer to that offer proposed to give possession *on the 1st of August*. An acceptance on terms differing from the offer cannot be a final arrangement, and it is therefore not a valid acceptance. Although the defendant gave the plaintiff six weeks to accept his offer, yet as there was no express stipulation that, for the chance of the plaintiff's acceptance, the defendant should, during that six weeks, be bound not to retract, the defendant might retract at any time before the plaintiff accepted. The language in which the judgment of the Court of King's Bench is expressed, in the case referred to, proves that this is the law. The Court say, that, until an acceptance, the party is supposed to be continually repeating his offer. The presumption of a repetition of the offer is rebutted by a declaration that the offer is retracted. It is not just, that one party should be bound when the other is not. I also think, that the objection on the ground of variance is sufficient to prevent the plaintiff from recovering. He states in one count, that he had, at the time of his agreement with the defendant, a contract for a lease. That means,

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such a contract as may be enforced in a Court of law. Now there certainly was no contract in writing; and I cannot collect, from the testimony of the landlord, that there was even a parol contract. There had been some conversation about renewing the lease, but nothing seems to have been concluded upon between the landlord and the plaintiff. It is stated, in the other counts, that the plaintiff had a lease that would expire in 1856, whereas, the lease which he had; would expire in 1835. That difference between the lease which the plaintiff had, and the lease set out in the declaration, is a substantial difference. I do not decide whether a man may assert in his contract that he has goods, or an estate, which he has not, if he be ready with such goods as he sells at the time they are to be delivered, or with a good title to the estate, at the time it is to be conveyed. I think the plaintiff must be nonsuited, on account of the repudiation of the contract before it was complete, and of the variance in the description of the thing bargained for.

Nonsuit.

Taddy, and *Jones*, Serjts., and *Wightman* for the plaintiff.

Wilde, Serjt., and *Patteson*, for the defendant.

[Attornies—*Rivington*, and *Forbes*.]

IN the following Term, a rule *nisi* was obtained for a new trial; but the Court were of opinion that the nonsuit was clearly sustainable on account of the variance between the declaration and the proof, as to the nature of the interest which the plaintiff had in the premises; and the rule, therefore, was eventually

Discharged.

See the cases of *Kennedy v. Lee*, *grave*, 4 J. B. Moore, 303, and 13 Meriv. 454; *Cooke v. Oxley*, 3 B. & B. 536. T. R. 653; and *Carvick v. Bla-*

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Adjourned Sittings at Westminster, after Hilary Term, 1828.

BEFORE MR. JUSTICE PARK.

(*Who sat for the Lord Chief Justice.*)

DOE dem. SAVAGE v. STAPLETON.

Feb. 16th.

EJECTMENT.—The defendant came into possession of the premises in question in the cause, on the 1st of August, 1825, and at Michaelmas in that year he paid the rent from the 1st of August to that time, and afterwards paid it quarterly, on the usual quarter days. A notice to quit on the 1st of August, 1827, was at first given by the lessor of the plaintiff, but he conceiving that such notice was not correct, afterwards gave a second notice to quit at the Michaelmas following, and he received the rent up to that time. The defendant said that he would not quit, unless he had a notice expiring at the half quarter.

A party took possession of premises on the 1st of August, and at the Michaelmas following paid the half quarter's rent, and continued afterwards to pay quarterly, on the usual feast-days:—Held, that in such case a notice to quit at Michaelmas was sufficient, and that although the landlord had at first given a notice expiring with the half quarter, it was not necessarily to be presumed from that circumstance that the tenancy was one from year to year, commencing with the half quarter.

V. Lawes, Serjt., for the plaintiff, relied on the case of *Doe dem. Holcomb v. Johnson* (a).

Russell, Serjt., for the defendant.—A tenancy commences from the time at which the tenant goes in, without reference to any quarter day, and the law requires a notice to quit at the expiration of a year from that particular time, unless there is any thing to take it out of the

(a) 6 Esp. 10. That case decides, that if a tenant comes in at the middle of a quarter, and afterwards pays rent for the period of time previous to the beginning of

the next regular quarter, from which time he pays half yearly, his tenancy commences from that regular quarter day to which he so paid up.

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usual course. The terms on which the parties stand, is a question for the Jury under all the circumstances, and it is quite clear, that the parties in this case contemplated a holding from the 1st of August, the day of the defendant's coming in. The notice to quit on that day, originally given by Savage, shews what was the understanding on the subject. That notice is waived by the receipt of rent to Michaelmas, and the second notice is not for the proper time. The learned Serjeant cited the cases of *Kemp v. Derrett (a)*, and *Doe dem. Wadmore v. Selwyn (b)*.

PARK, J.—In my opinion, there is nothing in this objection. In the case of *Doe v. Johnson*, the very distinction was taken by my Lord *Ellenborough*, who says, that “if the tenant comes in in the middle of a quarter, and he afterwards pays his rent for that half quarter, and continues then to pay from the commencement of a succeeding quarter, he is not a tenant from the time of his coming in, but from the succeeding quarter-day.” He never supposed that the tenancy was to begin from the half quarter. In the present case, the rent has been received up to Michaelmas-day, and the defendant has had the benefit of occupation up to that time. I am therefore of opinion, that the plaintiff is entitled to a verdict for nominal damages.

Verdict for the plaintiff.—Damages, 1s.

V. Lawes, Serjt., and *Holroyd*, for the plaintiff.

Russell, Serjt., and *Ferard* for the defendant.

[Attornies—*Argill & M.*, and *Ferard*.]

(a) 3 Camp. 510. In this case the defendant became tenant on the 29th October, and was “always to be subject to quit at three months’ notice.” It was contended that that notice must expire on the 29th of October, or some other quarter-day corresponding with that date. And Lord *Ellenborough*

was of this opinion: his Lordship said, “the defendant might have been made to hold from the preceding or succeeding general quarter-day; but, in the absence of all evidence to the contrary, I must presume that he held from the time when he entered as tenant.”

(b) Adams on Ejectment, p. 129.

The case of *Doe dein. Pitcher v. Donovan*, 1 Taunt. 555; and 2 Camp. 78, decides, that in a tenancy from year to year, determinable by a quarter's notice, the

quarter's notice will not be sufficient if given for any quarter day, but must expire at a quarter-day corresponding with that on which the tenancy commenced.

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EDWARDS, Gent., One &c. v. COOPER.

Feb. 16th.

ASSUMPSIT for work and labour as an attorney. The retainer, and the delivery of a signed copy of the bill, pursuant to the act of Parliament, were admitted. It appeared that there had been disputed accounts between the defendant, who was a coach builder, and one Lady Ramsay, which were referred to arbitration; and the arbitration bond was signed by Lady Ramsay, and, as she was a married lady, by her brother as her surety. After the arbitration had proceeded for some time, a dispute arose about a carriage; and it was agreed to add the question, for the decision of the arbitrator, whether or no Lady Ramsay should be compelled to purchase the carriage. This agreement was signed by the plaintiff on the behalf of the defendant, in his presence, and by Messrs. Dawes and Chatfield, who attended as solicitors for Lady Ramsay, in the presence of the plaintiff, but without any authority from her ladyship. This agreement was made a rule of Court, and the award was made upon it. A rule *nisi* was afterwards obtained for setting aside the award, on the ground of the absence of any authority for the submission with respect to the carriage. The matter stood over for a while under a suggestion from the Court, to see if the parties could agree to a second reference, and the rule was eventually made absolute. The rule itself was put in, and stated, that no cause was shewn. A witness was about to state what occurred in Court, previous to the rule being made absolute, for the purpose of shewing that some discussion took place about it, but he was stopped by

A dispute between A. B., a married woman, and C. D., was referred to arbitration. After the reference had proceeded for some time, an additional matter was submitted by the attorneys for the parties. C. D.'s attorney signed the submission in his presence. A. B.'s attorney signed in the presence of C. D.'s attorney, but without any authority from their client. The award was afterwards set aside, and C. D.'s attorney sued him for the expences of the arbitration: —Held, that he had not been guilty of such negligence, in not requiring to see the authority of A. B.'s attorney, as would prevent his recovering the amount of his bill.

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PARK, J., who said, I cannot take the testimony of the witness in opposition to the rule of Court. I was myself subpoenaed the other day in the Court of King's Bench, to prove what passed in this Court on a motion. And my Lord *Tenterden* said to the defendant, who was conducting his cause in person, "I need not keep my learned Brother here, because I cannot take his account of what passed in the Court of Common Pleas; I can only look to the rule of Court itself."

Wilde, Serjt., for the defendant, then submitted, that the plaintiff was not entitled to recover. In consequence of the negligence of the plaintiff, the defendant has lost all the benefit he expected to derive from his services. The negligence complained of was, I admit, an oversight, and not any thing which reflects on the general character of the plaintiff for attention and respectability. But the rule of law is perfectly clear. If an individual, whether a professional man or a tradesman, performs service for another, and that service is *productive to any extent*, negligence in doing it must be the subject of a cross action; but if the negligence is such, that the service is *wholly unproductive*, then the right to recover is taken away. In the case of *Montrion v. Jefferies* (a), which, like the present, was an action on an attorney's bill, Lord *Tenterden*, in his summing up, said, "The question is, whether you think that the expense was brought upon the parties by the inadvertence of the plaintiff." And the learned counsel who led for the plaintiff in that case, was so fully satisfied of the correctness of the mode in which the question was about to be left to the Jury, that he elected to be nonsuited. It was the bounden duty of the plaintiff in this case to see that the party to whom his client was opposed, was bound by the reference with respect to the purchase of the carriage. It does not appear that any

evidence was given to shew that Messrs. Dawes and Chatfield had authority to do anything more than attend and prosecute the reference under the original submission. The plaintiff should have required some proof of their authority to sign the second submission, especially as it was the case of a married woman and her surety, in which no general authority could by law be implied. Sureties are not bound by implication, but only by express authority.

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PARK, J.—The judge arbitrator was equally guilty with Mr. Edwards; was he not? He ought to have known what the law upon the subject was.

Wilde, Serjt.—That may or may not be; but I submit that the attorney who was to be paid was bound to see that his client was not injured. Whether or not the arbitrator, looking at the rank of the parties, might choose to confide in their honour, I do not know; but he would have been well warranted in so doing, as they were represented by respectable attornies. But Edwards was the especial agent of the defendant, paid to exercise that care, the want of which alone has deprived the defendant of the benefit which would have resulted from his services. It was not a matter of any difficulty. The plaintiff might easily have asked for the authority of Dawes and Chatfield, as the parties had personally signed the original submission. It appears that Dawes and Chatfield saw the second submission signed by the plaintiff in the presence of the defendant; therefore they were sure that the defendant was bound. The authority of Lady Ramsay, she being a married woman, would not be sufficient.

PARK, J.—Then were not the Court of King's Bench wrong in recommending a reference? They must have known that a married woman could not give such authority.

Wilde, Serjt.—I submit not. If a matter be doubtful,

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or even if it be clear, provided the Court think the legal objection a harsh one, they may properly suggest, while the parties are in a state of suspense as to the final result, that the matter should go before the same arbitrator, to prevent the necessity of any decision. I submit with confidence, that the plaintiff is not entitled to recover. Here is he, as an attorney, charging 100*l.*, for procuring an award which is not now in existence, because of the want of authority in Messrs. Dawes and Chatfield, which authority it was the plaintiff's duty to see that they possessed. There is nothing of more importance in cases of arbitration, than that the attorneys should see that the reference proceeds upon proper authority.

PARK, J.—It is admitted in this case, that the plaintiff is a highly respectable member of the profession, and that he has not been guilty of anything wicked, but merely of inadvertence. The question is this, is Mr. Edwards to be paid his bill or not? I am of opinion that there is not a colour for preventing his recovering. I agree perfectly with what is said by my Lord *Tenterden* in the case which has been cited. It is not to be imagined that Messrs. Dawes and Chatfield were playing the rogue, and endeavouring to entrap Mr. Edwards. There was a case tried in this Court, in which the present Lord Chief Justice, then at the bar, was counsel, and he argued in the same manner as my brother *Wilde* has to day, but the Court were of opinion against him. The question is this, could this plaintiff, Mr. Edwards, could any honourable or even any cautious man suppose, at such a time, when the reference had proceeded so far, that this objection would be afterwards taken in the Court of King's Bench. If you think,—and now I come to the words used by my Lord *Tenterden* in the case of *Montriau v. Jefferies*,—if you think that the plaintiff has brought all the expense upon the party by his improper conduct, you will, under that impression, find your verdict for the defendant. If you do

not, you will find for the plaintiff, and in that case the damages will be 100*l*.

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Verdict for the plaintiff—Damages, 100*l*.

Taddy, Serjt., and *Mallby*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*Edwards*, and *Coc*.]

CROFTS, Assignee, &c. v. STOCKLEY and Another.

Feb. 16th.

DEBT on a bail-bond.—The declaration stated, that the plaintiff (Josiah Crofts) had sued and prosecuted “out of the Court of our lord the now king, before the Right Honourable Sir *W. D. Best*, Knight, and his companions there, his Majesty’s justices of the bench, at Westminster, in the county of Middlesex, a certain writ of our said lord the king,” &c., “against one William Wright, directed to the sheriff of Northamptonshire, by which said writ our said lord the king commanded the said sheriff, that he should take the said William Wright if he should be found in his bailiwick, and him safely keep, so that the said sheriff might have his body before the justices of our said lord the king, at Westminster, on the morrow of All Souls then next ensuing, to answer the said Josiah of a plea of trespass; and also that the said William Wright might answer the said Josiah, according to the custom of his said Majesty’s Court of Common Bench, in a certain plea of debt,” &c. It then averred, that the writ was properly delivered, and that the sheriff arrested Wright, and before the return of the writ took the bail of the defendants for his appearance; and that they entered into a bail-

The declaration in an action on a bail-bond, stated the issuing from the Common Pleas of a writ for the arrest of the principal, by which the sheriff was commanded to have his body “before the justices of our said lord the king, at Westminster,” &c., to answer &c., and also, that he might answer &c., “according to the custom of his said Majesty’s Court,” &c. and alleged the condition of the bond to be for the appearance of the principal, “according to the exigency of the said writ in the said Court,” &c., and also to answer &c.,

“according to the custom of his said Majesty’s Court of Common Bench.” The condition, as proved at the trial, was for the appearance of the principal, before our said lord the king at Westminster,” &c., to answer &c., and also to answer “according to the custom of the king’s Court of Common Bench.”—Held, that there was not any material variance.

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bond, the condition of which was, "that if the said William Wright should appear, *according to the exigency of the said writ, in the said Court*, on the morrow of All Souls, to answer the said Josiah in a plea of trespass, and also that the said William Wright might answer the said Josiah, *according to the custom of his said Majesty's Court of Common Bench*, in a certain plea of debt for 400*l.*," that then the said obligation should be void, &c. It then averred that Wright did not appear according to the exigency of the writ, whereby the bond became forfeited, and the sheriff assigned it to the plaintiff. The plea was *non est factum*.

The condition of the bond was in the following terms:—

"The condition of this obligation is such, that if the above bounden William Wright do *appear before our said sovereign lord the king, at Westminster, on the morrow of All Souls next coming*, to answer Josiah Crofts in a plea of trespass; and also, that the said William Wright may answer the said Josiah, *according to the custom of the King's Court of Common Bench*, in a certain plea of debt, for 400*l.*, that then this present obligation to be void and of no force; otherwise to stand and remain in full force, vigour, and effect."

Ludlow, Serjt., for the defendants, contended, that there was a material variance. He cited *Mill v. Pollon* (a), *Impey v. Taylor* (b), and *Sheldon v. Whitaker* (c).

(a) 1 J. B. Moore, 19, and 7 Taunt. 271. In this case it was held that the words "*Court of the Bench*," in a plea of judgment recovered, could not be construed as descriptive of the Court of King's Bench, but could only be considered as describing the Court of Common Pleas.

(b) 3 M. & S. 166. An allegation, that an action was depending in his Majesty's Court of the Bench at Westminster, was held in this case not to be sustained by proof

of a pluries bill of *Middlesex*, because the allegation must be taken as describing the Court of Common Pleas.

(c) R. & M. 266. This was an action against the sheriff, on the 8 Ann. c. 14. The declaration stated, that the sheriff, by virtue of a "*writ of our said lord the king, before the king himself*," took the goods &c. The writ in point of fact issued from the Common Pleas, and it was held to be a material variance.

PARK, J.—I will direct a verdict for the plaintiff, and give my brother *Ludlow* leave to move for a nonsuit.

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Verdict accordingly.

Merewether, Serjt., and *Comyn*, for the plaintiff.

Ludlow, Serjt., for the defendant.

[Attornies—*Fuller & S.*, and *Collyer*.]

IN the ensuing Easter Term, *Ludlow*, Serjt., moved, pursuant to the leave given. He cited, in addition to the cases referred to at *Nisi Prius*, the case of *Renalds v. Smith* (a); and the Court granted a rule to shew cause. This rule came on in the Trinity Term following, and, after argument, was

Discharged.

(a) On a *capias* returnable in the *Common Pleas*, the sheriff made his mandate to the high bailiff of Pomfret, to take the defendant, so that he might have his body before his said Majesty at Westminster, in five weeks of Easter; and a bail-bond was taken with condi-

tion, for the defendant's appearance, before his said Majesty at Westminster, in five weeks of Easter. It was decided that this bond was void, because it described an appearance in the Court of King's Bench. 6 Taunt. 551.

BEFORE MR. JUSTICE BURROUGH.

O'BRIEN v. CURRIE.

Feb. 18th.

TRESPASS by a bankrupt against the petitioning creditor under his commission. It appeared that the bankrupt was a minor.

A commission of bankrupt cannot be supported against a person under age.

BURROUGH, J.—It is quite clear, that a commission of bankrupt against a person not of age is not good in law.

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Bankruptcy formerly was considered as a crime, and a commission issued against an infant certainly cannot be supported, but is absolutely void.

Verdict for the plaintiff.

Wilde, Serjt., and *Steer*, for the plaintiff.

Andrews, and *E. Lawes*, Serjts., for the defendant.

[Attornies—*Ivimey* and *Baddeleys*.]

BEFORE MR. JUSTICE GASELEE.

HUNT v. ALEWYN and Another.

Feb. 19th.

In an action by the indorsee of a bill of exchange, accepted in a foreign country, against a party in London who undertook to negotiate it, for not paying over the proceeds, which is tried after the bill has become due, parol evidence may be given of the particulars of the bill.

Seemle, that if the declaration in such case allege that the proceeds were received, some evidence of the receipt must be given by the plaintiff at the trial; and a letter written by the defendant, a month before action brought, saying that the

ASSUMPSIT.—The *first* count in the declaration stated, that the plaintiff was lawfully possessed of a certain bill of exchange, for 6,240 florins, foreign money, and of the value of 600*l.*, drawn by one F. Bayertz, upon certain persons trading at Amsterdam under the firm of Horstman & Co., payable on the 24th of December, 1827; and being so possessed thereof, he, on the 1st of October, 1827, delivered the same to the defendants, to be by them negotiated, and caused to be discounted for his use and benefit, for certain commission or reward; and in consideration of the premises, and of such commission, they undertook and promised him to negotiate the said bill, and cause and procure it to be discounted for his use and benefit, and to pay him the proceeds, after deducting commission and expenses, whenever they, after the discounting, should be thereunto requested. It then averred, that, after the delivery of the bill, to wit, on the 2d of October, 1827, the defendants procured it to be discounted, and received the proceeds, amounting, after the deductions, to 512*l.* 7*s.*;

money would be received in a few days, is not sufficient.

yet that they did not nor would pay the plaintiff the proceeds, but kept and retained them, contrary to their promise and undertaking.

The *second* count was more general, on a promise to get the bill discounted, and pay over the proceeds, on request, with an averment of the actual discount, and receipt of the proceeds, and a refusal to pay over the amount to the plaintiff. There were the money counts; and the plea was *non assumpsit*.

It appeared that Bayertz, who was living in London, was indebted to the plaintiff for money lent, &c. The plaintiff issued a writ against him, and Bayertz proposed to give him an order on Messrs. Horstman & Co., at Amsterdam, for whom he (Bayertz) was shipping iron. The plaintiff not knowing anything of the respectability of Horstman & Co., Bayertz took him to the defendants, Messrs. Alewyn & May, who were consuls to the king of the Netherlands. They said that the house of Horstman & Co. was a house of credit, and they would negotiate any bill which was accepted by them. This was on the 18th of September. The plaintiff and Bayertz then went together to Amsterdam, and obtained the acceptance of Horstman & Co. to a foreign bill, which they brought to the defendants, who undertook to negotiate it on the behalf of the plaintiff. On the 2d of October, the defendants wrote to the plaintiff, saying that they had negotiated the bill, and that the money would be paid by the purchaser in the course of a day or two. They also enclosed a letter from a Mr. Hutchinson, who made a claim upon the bill as a creditor of Bayertz, observing, that they hoped the plaintiff would be able to arrange with that gentleman. There was, at the foot of the defendant's letter, a note of the amount of the bill, with the drawer's and acceptor's names, and the deductions for commission, &c.

On the next day, the plaintiff wrote an answer, saying, that Mr. Hutchinson's claim could not affect him as a *bond*

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fide holder, and requiring the proceeds to be paid. Bayertz afterwards became bankrupt.

A brother of the plaintiff, who had seen the bill while it was in his possession, was called on his behalf to prove the particulars of it.

Taddy, Serjt., for the defendants, objected. The plaintiff cannot give parol evidence of this. He must produce the bill, or an attested copy.

GASELEE, J.—I shall not turn the plaintiff round upon this objection. I will allow the questions to be asked.

The witness then proved the bill, as set out in the declaration. He stated that his brother's indorsement was not upon it.

Taddy, Serjt., submitted, that the plaintiff ought to be nonsuited. There is no proof of the plaintiff's title to the bill. His indorsement is not upon it. There is nothing but a letter of the defendants stating that they had negotiated it.

GASELEE, J.—There is no mention in the letter of the receipt of the proceeds.

Wilde, Serjt., for the plaintiff.—If an agent writes a letter, saying that proceeds will be received in a few days, and the action is not brought for a reasonable time afterwards, it is to be presumed, that, at such time, the proceeds had come to his hand. This action calls upon the defendants, either to pay or shew that they have not received. The plaintiff has waited more than a month, and that is quite sufficient. It was the duty of the defendants to receive the proceeds, they having negotiated the bill. It is in their power to shew, whether they have received them or not; the plaintiff cannot know any thing about it.

GASELEE, J.—In both counts, you allege that they negotiated the bill, *and received the proceeds*; must not you give some proof of the receipt (a)? you declare against them for not paying you the money. But I will not turn the party round upon it.

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Wilde, Serjt., then, for the purpose of shewing such receipt, put in a letter of the defendants, of the 4th of October, in which they stated that an attachment, at the instance of Messrs. Glazebrook & Co., against the proceeds in their hands, as the property of Bayertz, had been lodged with them from the Lord Mayor's Court.

Taddy, Serjt., then submitted, that this was an answer to the action, as it negatived the assertion of title in the plaintiff, by shewing that it was in somebody else.

Wilde, Serjt.—There is no colour for the objection. In the first place, the attachment is no answer, unless it is carried on to a judgment: there was a case to that effect in this Court. And in the second place, their telling us, that a third person asserts that the proceeds are the property of Bayertz, is no evidence of their being so in fact.

Taddy, Serjt.—I allow that it has been decided, that when an attachment is set up by the defendant, and proved as his case, then it must be shewn that it has proceeded to a judgment. But that is not the case here. The attachment appears on the plaintiff's own shewing; and as

(a) In the case of *Garrett v. Handley*, which was an action on a guarantie, the undertaking was to "*make provision for the repayment*," of a sum of money, "*under*," an "*arrangement*," then "*going on, for settling*" the bor-

rower's "*affairs*." *Abbott*, C. J. held, that some evidence must be given by the plaintiff, to shew that no provision had been made by the defendant. Vol. 1, of these Reports, pp. 217, and 484.

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he does not go on to shew what has been done in it, it must be taken to be a regular attachment.

GASELEE, J.—The attachments in the case alluded to by my brother *Wilde*, were attachments which had not been regularly proceeded in. There had been time to go on with them, but the parties did not proceed regularly. I will however reserve the point. I think it is better that the case should go to the Jury.

Bayertz was then called as a witness, and stated, that he gave the bill to the plaintiff for a *bond fide* consideration, and that he had not any interest in it at the time when it was negotiated by the defendants.

GASELEE, J., left to the Jury the question of the employment of the defendants, and they found a

Verdict for the plaintiff.

Wilde, Serjt., and *Hutchinson*, for the plaintiff.

Taddy, Serjt., for the defendants.

[Attornies—*Mayhew* and *Gates*.]

In the ensuing Easter Term, *Taddy*, Serjt., moved to set aside the verdict, pursuant to the leave given at the trial; but the Court were of opinion against him, upon both his objections, and therefore the rule was

Refused.

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BEFORE MR. JUSTICE PARK.

The TRUSTEES of the BRITISH MUSEUM v. WHITE.

Feb. 20th.

ISSUE from the Court of Chancery.—This was a special jury cause; and ten special jurors only appeared.

Held at *Nisi Prius*, that in a special jury cause the plaintiff's counsel cannot have a *tales* without the consent of the counsel for the defendant.

Wilde, Serjt., for the plaintiffs, prayed a *tales*.

PARK, J.—Do the other side consent? Because I do not think that a plaintiff has any right to have a *tales* without consent on the part of the defendant. I know that other Judges have a different opinion upon this subject; but I must act upon my own impressions.

Bosanquet, Serjt., for the defendant, gave his consent; and the cause proceeded.

Wilde, Serjt., *Coote*, and *Patteson*, for the plaintiffs.

Bosanquet, and *Adams*, Serjts., for the defendant.

[Attornies—*Bray & W.*, and *Rogers & Son.*]

LEES v. WHITCOMB.

Feb. 22nd.

ASSUMPSIT.—The first count of the declaration stated, that, at the time &c., Martha, the wife of the plaintiff, was, and from thence &c., a dress-maker and milliner, &c., and thereupon, on the 5th day of June, 1826, in consideration that the said plaintiff, at the special instance and request of the said defendant, would receive the said

An agreement by which A. B. agrees "to remain with" C. D. for two years from the date of it, "for the purpose of learning" a particular business, will not support a declaration stating the

consideration to be, that C. D. would "receive" A. B. "into his service."—*Semble*, also, that such an agreement is not available, on the grounds of there being no mutuality, and no consideration appearing on the face of it.

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defendant into his house, and find and supply her with board and lodging, and cause her to be taught the trade and business of a *dress-maker and milliner*, by the said wife of the said plaintiff, she the said defendant agreed and undertook, and faithfully promised the said plaintiff to remain and continue with the said wife of the said plaintiff for two years from the day and year aforesaid, for the purpose of learning the business of a dress-maker and milliner. It then averred that the plaintiff, confiding in the said promise of the said defendant, received her into his house, and that she *remained in his house* for a long time, to wit, from the day and year aforesaid, until the 14th day of April, 1827; and that during the time she so remained, he supplied her with *board and lodging, and other necessities*, and caused her to be taught by his wife the trade and business of a dress-maker. Then came an averment that the plaintiff was ready and willing to have suffered the defendant to have continued for the remainder of the two years, and would have supplied her &c., and taught her &c.; but that the defendant did not, nor would, although often requested so to do, remain and continue with the said wife of the said plaintiff, or in his house, but wholly neglected and refused so to do; and on the contrary, before the expiration of the said two years, to wit, on the said 14th day of April, without the licence and consent of the said plaintiff and his said wife, or either of them, and against their will &c., left the house of the plaintiff and the service of him and his wife, and continued absent, whereby he had lost the profits which he would have derived from her service and assistance.

The *second* count was similar in substance to the first, except that it omitted the words "*other necessities*" in the statement of the consideration, after the words "*board and lodging*," and stated, that the plaintiff undertook to receive the defendant *into his service*.

The *third* count only mentioned the business of a dress-

maker, omitting the word "*milliner*;" but in other respects it was similar to the first count.

The *fourth* count contained the words "*dress-maker and milliner*," but omitted the words "*board, lodging, and other necessities*."

The *fifth* count omitted both the word "*milliner*," and the words "*board, lodging, and other necessities*," but stated the consideration to be as in the second count, that the plaintiff would receive the defendant into his service.

The *sixth* count was for work and labour in teaching and instructing, and for meat, drink, washing, lodging, &c.

There were the usual money counts. Plea—*Non assumpsit*.

The agreement given in evidence on the part of the plaintiff, was as follows :—

"I hereby agree to remain with Mrs. Lees, of 302, Regent Street, Portland Place, for two years from the date hereof, for the purpose of learning the business of a dress-maker, &c. As witness my hand, this 5th day of June, 1826.

Amelia Whitcomb."

Wilde, Serjt., for the defendant, submitted, that the plaintiff was not entitled to recover. There is no contract at all on the part of the plaintiff. The defendant contracts to remain two years to learn something, and nobody, by the agreement put in, is bound to give her instruction; nor are there any words in the agreement importing beneficial service to the plaintiff. It cannot be intended that a person learning will benefit the person teaching. The consideration must appear on the face of the agreement; but there no person at all is bound. It is quite clear that the husband is not bound, because the wife, to bind the husband, must make the contract for him. The first count states a contract with respect to dress-making and *millinery*; and the agreement neither contains that nor any stipulation about necessities.

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PARK, J.—As to the first count, I perfectly go along with you.

Wilde, Serjt.—The second, third, and fourth counts are also incorrect. The fifth count states the consideration to be an agreement on the part of the plaintiff, to receive the defendant into his service, and to cause her to be taught. The plaintiff must shew that he had entered into a binding contract. It cannot here be left to implication, because there is a written agreement to which you cannot add. No action could have been brought by the defendant against Lees. The contract also does not import beneficial service. Learning, unexplained on the face of the agreement, does not import any such thing.

PARK, J.—The last case on this subject was of *Jenkins v. Reynolds* (a), in this Court.

Taddy, Serjt., for the plaintiff.—All that is necessary is, that the agreement should be signed by the party to be charged. If the Court can imply the consideration for the promise of such party, by inference from the nature of his obligation, that is sufficient. The case of *Egerton v. Matthews* (b) is decisive on this point, in favour of the plaintiff.

PARK, J.—I should doubt whether that case can now

(a) 6 J.B. Moore, 86. In that case the defendant was sued on a memorandum, written and signed by him, and addressed to the plaintiff, in the following words: "To the amount of 100*l.*, consider me as security on J. C.'s account." It was held that this was not binding under the statute of frauds, as it did not express the consideration for the undertaking.

(b) 6 East, 307. That case decides that a memorandum, signed by a defendant, whereby he agrees to give a certain sum for goods, takes the case out of the 17th section of the statute of frauds, though not signed by the seller, nor expressing any consideration for the promise of the defendant, other than by inference from his own obligation.

be supported, consistently with *Wain v. Warlters* (c), which the King's Bench confirmed in the case of *Saunders v. Wakefield*, and we, on full consideration, confirmed it in this Court also.

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Taddy, Serjt.—The case of *Wain v. Warlters* is no doubt established; but *Egerton v. Matthews* is consistent with it, because the obligation to buy imports an obligation to sell; and, in the present case, an obligation to teach is to be inferred, because, without a teacher a party cannot learn. As to the beneficial service, the staying two years is a beneficial service. As to the matter of form in the declaration, the words, “&c.” in the agreement, mean the business, whatever it was, that Mrs. Lees was then carrying on; but the count is quite sufficient without. With respect to the receiving into the house, the expression is, that the defendant shall *remain*. The case of *Wain v. Warlters* is a case of great nicety, it is *inter apices juris*; but that case does not say that the obligation on one part may not be implied from the other part of the agreement. I submit that the first count is quite supported.

Hutchinson, on the same side.—*Wain v. Warlters*, and *Saunders v. Wakefield*, are cases of contracts to pay the debt of another (d). In the *Duke of Norfolk v. Worthy* (e), the

(c) The cases of *Wain v. Warlters*, and *Egerton v. Matthews*, were decided on different sections of the statute of frauds; the former on the 4th, and the latter on the 17th section. In the 4th section the word *agreement* is used; and the Court, in *Egerton v. Matthews*, are said to have decided on the ground that the object and wording of the two sections were different. The present case being the case of an agreement not to

be performed within a year, would of course come within the provisions of the 4th section, and be subject to the construction which was put upon that section, in the case of *Wain v. Warlters*, which case decides that the writing must contain the *consideration* for the promise as well as the promise itself.

(d) See note (c), *supra*.

(e) 1 Camp. 337.

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Duke's name did not appear till after the breach of the contract.

Wilde, Serjt., in reply.—My objection is, first, that there is no mutuality; and secondly, that the consideration on the face of the contract is not a consideration for the benefit of the State.

PARK, J.—I am of opi
points. There is no m
not have brought any a
also of opinion, that the
face of the agreement.

Taddy, Serjt.—Will your

PARK, J.—I never nonsuit with the defendant. I do not leave to move in this case.

Taddy, Serjt., and Hutchi

Wilde, Serjt., and Morgan

[Attornies—May 14]

IN the ensuing Easter Term a rule nisi for a new trial, with the Trinity Term following.

June 14th.

Wilde, Serjt., shewed cause
supports any part of the declaration
received under the agreement
to learn merely, and not as a
consideration alleged in the declaration
therefore is, that there was no contract of service. The question is not whether service was incidentally received, but was service the object of the agreement? While scholars

are learning to write, a schoolmaster may apply their writing to some beneficial purpose, yet his so doing will not make the boys his servants. The agreement not being to be performed within a year, must be in writing, and the whole of it must be contained in the writing. The plaintiff complains of loss of service, and he must shew that the defendant was under an obligation to serve. Here the court called upon —

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Taddy, Serjt., to support his rule.—I rely on the fourth and fifth counts. The consideration there assumes what was proved at the trial, and was the *result* of the agreement, viz. that the continuing for two years was a beneficial service. The defendant was unacquainted with the business when she came, and as soon as she had learned she went away. The word service here means continuing with a master who is to give instruction. The meaning of the word *remain* in the agreement is, that the learner will continue with the teacher for the sake of beneficial service. The case of *Egerton v. Matthews* seems strongly in our favour.

PARK, J.—The services *were* beneficial, but they *might* have been otherwise:

Taddy, Serjt.—That only affects the amount of compensation. We must take the chance of that.

BEST, C. J., was of opinion that neither of the counts was proved.

BURROUGH, J.—Since *Wain v. Walters*, and the other case, it is clear that the consideration must appear upon the face of the agreement; and that is the short answer to this case.

GASELEE, J.—I have a doubt upon the subject, but not

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sufficiently strong to induce me to disagree with the opinions expressed by the rest of the Court.

Rule discharged.

The act of the 9 Geo. 4, c. 14, s. 7, which comes into operation on the 1st of January 1829, after referring to the 17th section of the English statute of frauds, 29 Car. 2, c. 3, and a similar provision in the Irish act, 7 W. 3, c. 12, enacts, "That the said enactments shall extend to all contracts for the sale of goods, of the value of 10*l.* ster-

ling, and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of such contract, be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

BEFORE MR. JUSTICE BURROUGH.

Feb. 24th.

ROBERTS v. ROBERTS.

A party borrowing money, gave the lender a paper in the following form:—"I owe you one hundred pounds, Charles Roberts, 30th July, 1821."

Underneath was written, "August 17th, received fifty pounds, Charles Roberts:"—Held, in an action by the lender, to which the statute of limitations was pleaded, that the latter memorandum, which was within the six years, did not constitute such an acknowledgment of the existence of the debt mentioned in the former, as to take it out of the operation of the statute.

ASSUMPSIT for money lent, &c. Pleas—the general issue, and the statute of limitations (a). It was admitted that several of the sums sought to be recovered, were clearly within the statute, and the claim for them was therefore abandoned; but there were two sums, one of 50*l.* and the other of 100*l.*, which the plaintiff contended he was entitled to, under the following memorandum, which was in the defendant's hand-writing:—

"I owe you one hundred pounds.

CHAS. ROBERTS.

30th July, 1821.

"August 17th, received fifty pounds (b).

CHAS. ROBERTS."

(a) The plea of the statute was, that the cause of action did not accrue "within six years next before the suing out of the *original writ*;" and it was contended, that

the production of the *capias* was not proof in support of that allegation, but Burrough, J., was of opinion that it was quite sufficient.

(b) It was objected, that this

The latter part of this paper was written within the six years, but the former was not; but it was submitted, on the part of the plaintiff, that, as, within the six years, the defendant had received 50*l.*, and had acknowledged such receipt upon the same paper which contained the acknowledgment of his owing a previous debt, his act was a confession that the first sum still remained due.

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Wilde. Serjt., for the defendant, argued, that the law required a clear, unequivocal, and unconditional admission; and that no such admission was contained in the paper relied on.

Merewether, Serjt., for the plaintiff.—It is for the jury to say, whether the defendant, when he signed the second memorandum, did not re-affirm the first.

BURROUGH, J.—It is now decided, that there must be a positive promise. I held out against it as long as I could; but it having been so decided, I cannot now put the question to the jury. I shall tell them that there is no evidence of a promise (c).

Verdict for the plaintiff for 50*l.*, with leave to move to increase it by adding the 100*l.*

paper could not be given in evidence without a receipt stamp; but *Burrough*, J., overruled the objection, and referred to *Brooks v. Davies*, *ante*, Vol. 2, p. 186, which decides, that a paper not put in as a receipt, although in the form of one, does not require a stamp; reference was also made to *Tomkins v. Ashby*, 6 B. & C. 541, in which Lord *Tenterden* intimates, that the only receipts requiring a stamp are such as import that something which was formerly due has been dis-

charged. See also the case of *Mullet v. Hutchison*, *ante*, p. 92.

(c) In the case of *A'Court v. Cross*, 3 Bing. 329, it appeared that the defendant, being arrested on a debt more than six years old, said, "I know that I owe the money, but the bill I gave is on a three-penny receipt stamp, and I will never pay it." This was held not to be such an acknowledgment as would revive the debt against a plea of the statute of limitations. And in the judgment in that case, *Best*, C. J., is reported to have

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Merewether, Serjt., and *Carter*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*Roche & R.*, and *Pullen*.]

IN the ensuing Easter Term, *Merewether*, Serjt., moved, pursuant to the leave given. He contended, that the memorandum could not be construed otherwise than as a promise, and if not a promise, it was nothing.

The Court said, that the two items were distinct matters, and, therefore, could not have the effect suggested. If the sums had been cast up, it might perhaps have been otherwise.

Rule refused (*d*).

said: "The Courts, however, have not stopped here; they have said, *acknowledgment* of a debt is sufficient, *without any promise to pay it*, to take a case out of the statute. I cannot reconcile this doctrine either *with the words of the statute* or the language of the pleadings." The case also of *Scales v. Jacobs*, 3 Bing. 638, decides, that where, to a plea of the statute of limitations, the plaintiff replies a promise within six years, and proves a promise to pay *when of ability*, made three years after the original cause of action accrued, and within six years of the commencement of the action, he must at the trial prove the defendant's ability. Mr. Justice *Burrough* (who with Mr. Justice *Park* dissented from this decision), is reported to have said, "as to the supposed necessity for a promise, instead of, or as well as,

a mere acknowledgment, it should seem not to be necessary in this case, from the circumstance that an action of debt would have lain to recover the price of the goods sold and delivered, and that a bare acknowledgment of the contract would have been sufficient to support such an action. His Lordship also said,—"There seems to be a solid and recognised distinction between an acknowledgment made before the expiration of the six years, and an acknowledgment after."

(*d*) The law as to what is sufficient to take a case out of the statute, has received very considerable alteration and amendment from an act introduced in the House of Peers by the Right Honourable Lord *Tenterden*, Chief Justice of the Court of King's Bench. That act, which received the royal assent on the 9th of May,

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1828, and comes into operation on the 1st of January, 1829, after referring to the enactments of the English statute, 21 Jac. 1, c. 16, and the Irish statute, 10 Car. 1, Sess. 2, c. 6, enacts *inter alia*, "That in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: Provided always that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: Provided also, that, in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint-contractors, or executors or administrators, shall, never-

theless, be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants, against whom he shall recover, and for the other defendant or defendants against the plaintiff."

Section 2, enacts, "That if any defendant or defendants, in any action on any simple contract, shall plead any matter in abatement, to the effect, that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial, that the action could not, by reason of the said recited acts or this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same."

Section 3, enacts, "That no indorsement or memorandum of any payment written or made, after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes."

Section 4, enacts, "That the said recited acts and this act shall be deemed and taken to apply to the case of any debt or simple contract, alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise."

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Section 8, enacts, "That no memorandum or other writing made necessary by this act, shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps."

The act is the 9th Geo. 4, c. 14, and it is intitled "An act for rendering a written memorandum necessary to the validity of certain promises and engagements."

*Further Adjourned Sittings in London, after
Hilary Term, 1828.*

BEFORE LORD CHIEF JUSTICE BEST.

April 15th.

Low and Others v. COPESTAKE.

If several persons, not partners in business, separately indorse, for the accommodation of the drawer, a bill of exchange, which has been previously indorsed by another person, and, on the bill being dishonoured, pay the party who has discounted it in equal proportions, they may strike out their own indorsements, and bring a joint action against such previous indorser, to recover the amount of the bill.

ASSUMPSIT.—The declaration stated, that a certain person, using the name &c., of Frances Elizabeth Biden, on the 6th day of May, 1826, according to the usage and custom of merchants, made her certain bill of exchange, directed to one Frances Biden, and thereby required her, twelve months after date, to pay to the order of her the said Frances Elizabeth Biden, the sum of 100*l.*, for value received. It then averred that the said Frances Elizabeth Biden indorsed the bill, to the order of the defendant, and that "the said *defendant then and there indorsed and delivered the same bill of exchange to the said plaintiffs,*" &c. Plea—The general issue.

It appeared that the defendant, a lace merchant, in London, indorsed the bill, for the accommodation of the drawer, who kept a school at Ramsgate, and that the three plaintiffs, Messrs. Low, Austen, and Rhodes, who were tradesmen at Ramsgate, but not partners in business, each separately indorsed also for the drawer's accommodation, immediately under the indorsement of the defendant. After these indorsements, the bill was discounted by ano-

ther Ramsgate tradesman, and when it became due, it was not paid by either the drawer, or acceptor, and the holder applied to the plaintiffs, and received from them the amount, all at the same time, each of them advancing one third of the money.

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Wilde, Serjt., for the defendant, submitted, that the three plaintiffs, under the circumstances, could not be said to take the whole jointly under the defendant's indorsement; and that their each paying a part of the money, did not give them that joint interest, which would enable them to maintain the action. He cited the case of *Machell* and Others v. *Kinnear* (a).

For the plaintiffs, the cases of *Ord* and Others v. *Portal* (b), and *Atwood* and Others v. *Rattenbury* (c), were relied on.

(a) 1 Stark. 499. That case decides, that, where a bill of exchange, is, by the direction of the payee, indorsed in blank, and delivered to A., B., & Co., who are bankers, on the account of the estate of an insolvent, which is vested in trustees for the benefit of his creditors,—A. and B. two of the members of the firm, and also trustees, cannot, conjointly with a third trustee, who is not a member of the firm, maintain an action against the indorser, without some evidence of the transfer of the bill to them, as trustees, by the firm, by delivery or otherwise.

(b) 3 Camp. 239. This was an action by three plaintiffs as indorsees, against the acceptor of a bill indorsed in blank; there was no evidence of their being in partnership. It was objected that they could not recover, because there was no

proof to support the allegation, that the bill was indorsed to the three together. But Lord *Ellenborough* said, "There is no occasion for any such evidence. The indorsement in blank conveys a joint right of action to as many as agree in suing on the bill."

(c) 6 J. B. Moore, 579. In this case, the plaintiffs, as indorsees of a bill of exchange, sued the drawer, in their own right, and it appeared, that the bill had been indorsed to them in blank, before the death of one of the firm, who was a partner with them as bankers, and it was held that the action was well brought, without their describing themselves as surviving partners in the declaration, as they were not bound to prove the partnership, or that the bill was indorsed or delivered to them jointly with their deceased partner.

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BEST, C. J.—It appears to me, that the plaintiffs did not possess themselves of this bill by any joint payment, but by separate payments. But, allowing it to be so, why may they not strike out their indorsements, and proceed as the possessors of the bill? I do not know of any law to prevent their doing this; and I am therefore of opinion, that they are entitled to a verdict (*d*).

Verdict for the plaintiffs, 10*4*l.

Taddy, Serjt., and *Tomlinson*, for the plaintiffs.

Wilde, Serjt., and *Perring*, for the defendant.

[Attornies—*Fairbank*, and *Freeman & Co.*]

(*d*) In the case of *Machel v. Kinnear*, cited on the part of the defendant, Lord *Ellenborough* said, that if it had not been for the evi-

dence of the *particular transfer*, an indorsement in blank might have entitled the parties who brought the action to recover.

April 15th.

GWYNNE, Esq. v. MAINSTONE.

An instrument by which A. agrees to let, and B. to take, certain premises, on the terms that A. shall pay certain specified rents, varying in amount, at the end of every three years, up to a specified date, and which provides, that, from and after that date, "he shall pay the clear annual rent of 9*l*. till the end of the lease," but does not mention any time at which the lease is to terminate, is good only for the time previous to the date at which the 9*l*. is to commence.

ASSUMPSIT, to recover 31*l*., as half a year's rent, from Midsummer to Christmas, 1827, upon the following instrument, dated the 6th of July, 1827, and signed on that day by the plaintiff and defendant.

"Dr. Lawrence Gwynne hereby agrees to let to Mr. Charles Mainstone, a house and premises situate in Gwynne's place, Hackney Road, now in the possession of the said Charles Mainstone, upon the terms and conditions hereinafter stated; that is to say, that the said Charles Mainstone shall pay to the said Lawrence Gwynne, by quarterly payments, the annual rent of 62*l*., clear of land-tax,

sewers' rate, and all other rates and taxes whatsoever, from Midsummer-day last past, till Midsummer-day, 1830; and from and after Midsummer-day, 1830, he shall pay the clear annual rent, as aforesaid, of 57*l.* till Midsummer-day, 1833; and from and after Midsummer-day, 1833, till Midsummer-day, 1836, he shall pay the clear annual rent, as aforesaid, of 52*l.*; and from and after Midsummer-day, 1836, till Midsummer-day, 1839, he shall pay the clear annual rent of 51*l.*; and *from and after the year 1839, he shall pay the clear annual rent of 9*l.*, till the end of the lease.* And the said Charles Mainstone agrees to keep the said house and premises in thorough repair, and to insure the same from fire in the sum of 500*l.*, in one of the public offices, in the joint names of himself and the said Lawrence Gwynne, and to pay 9*l.* to the said Lawrence Gwynne for the lease. And the said Charles Mainstone hereby agrees to take the said house and premises, upon the terms and conditions hereinbefore stated."

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This instrument was stamped with a 30*s.* lease stamp.

Wilde, Serjt., for the plaintiff.—This action is said to be defended on the ground that the instrument is void for uncertainty. But there is certainty for a particular time, and that is sufficient. The action is brought to recover half a year's rent, from Midsummer to Christmas, 1827, and there is a clear agreement to pay a certain rent, from Midsummer, 1827, to Midsummer, 1830. After the completion of the time specifically mentioned in the agreement, it will then operate as a lease at will.

BEST, C. J.—There is no time mentioned at which the tenancy is to be determined.

Wilde, Serjt.—No, my Lord; but it is sufficient for the time specified. Plowden's Com. 271 (a).

(a) *Say v. Fuller* and Another. ten years by indenture, wherein The case decides; that a lease for the lessor grants, that, if the lessee

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Taddy, Serjt., for the defendant, contended, that the plaintiff was not entitled to recover, as the agreement was evidently imperfect, and not intended to be acted upon as the foundation of a suit.

BEST, C. J.—Plowden's Commentary says, "Brown said, if one make a lease for three years, and so from three years to three years, during the life of J. S., this shall be a good lease for no more than six years; for, during six years, there is certainty, for it was certain for the first three years: and when he says, and so from three years to three years, this is as much as if he had said, from this first three years during other three years, which contains certainty; but when he goes further, and says, during the life of J. S., this does not contain any certainty, for it is uncertain how many more years J. S. may live. So that at the commencement of the lease, the end of the number of years intended is not known, which is contrary to the nature of a lease for years, and therefore it shall only be good for six years in all. *Quod Dyer concessit.*" Upon the authority of this passage, I think that the instrument in question is good for the time certain, *vis.* up to Midsummer, 1839.

Taddy, Serjt., also contended, that the instrument was not itself a lease, but merely an agreement for a lease.

But upon this point, at the suggestion of the Lord tice, an arrangement was entered into between the parties, by which the plaintiff undertook to execute a lease up to the year 1839, and was allowed to have his verdict entered for the half year's rent which was due.

pay, at the end and term of every ten years, ten thousand tiles, then he shall have a perpetual demise of the land, from ten years to ten years continually following, and out of the memory of man, is a

good lease for no more than ten years; for, beyond that, no other term has any certain commencement, continuance, or end. This case is also reported in 4 Bac. Abr. 176.

Wilde, Serjt., and Hutchinson, for the plaintiff.

Taddy, Serjt., for the defendant.

[Attornies—*Norton, and Ashton.*]

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In 6 Coke, 36, it is said, if a man make a lease for years, without saying how many, this shall be a good lease for two years certain, because for more there is no certainty, and for less there can be no sense in the words; and in 4 Bacon's Abridgment, p. 179, it is said, "If a parson make a lease for a year, and so from year to year, as long as he shall continue parson, or as long as he shall live,

this is a lease for two years at least, if he lives and continues parson so long; and after the two years, or at most after three years, but an estate at will for the uncertainty, unless livery be made. See the cases of *Phillips v. Hartley*, ante, p. 121, and *Wright v. Trevezant*, post, as to what is a lease, and what an agreement merely.

HAWKINS v. FINLAYSON.

April 16th.

ACTION by a bargeman, to recover damages for the loss of clothes, &c., occasioned by the sinking of a barge, in consequence of its being run foul of by a steam boat, of which the defendant was the captain and owner.

The injury took place in the river Avon, and the defendant was in the vessel, but he had a pilot on board, who was steering at the time of the accident. This pilot was tendered as a witness on his behalf.

Bompas, Serjt., for the plaintiff, submitted, that he must be released.

Wilde, Serjt.—They have shewn that the captain and owner was on board.

BEST, C. J.—It has been held in insurance cases, in the Court of Common Pleas, that the pilot is answerable.

In an action against the captain and owner of a steam vessel, for an injury resulting from the improper management of the vessel, if it appear, that a pilot had the control, such pilot is not a witness for the defendant, without a release, although the defendant himself was on board at the time.

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The pilot, being asked, said, "the captain does not interfere with my steering, I go where I please."

Wilde, Serjt. — The cases in which pilots have been held to be answerable, are the cases of Trinity House pilots, which, by the act of Parliament, captains are *compellable to take*.

BEST, C. J. — I think he is not a witness without a release.

The objection was afterwards withdrawn.

Verdict for the plaintiff.

Bompas Serjt., and *Fish*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*Hicks & B.*, and *Clarke, R. & M.*]

COURT OF KING'S BENCH.

Sittings at Westminster, after Hilary Term, 1828.

BEFORE LORD TENTERDEN, C. J.

Feb. 18th.

BURTON v. GREEN, Esq.

To prove an act of bankruptcy in a trader who is a member of Parliament, by his not paying or securing to a creditor a debt of 100*l.* after the

CASE against the defendant, as sheriff of the county of Lancaster, for a false return of *nulla bona* to a writ of *fiery facias*, sued out by the plaintiff against Thomas Claughton, Esq. *Second count* for neglecting to levy.

suing out of a writ of summons, &c. it is not absolutely necessary to call the creditor.

If a writ of *fi. fa.* be sued out against one of several partners, for a debt due from him alone, there is great doubt as to what interest in the partnership property can be sold by the sheriff.

The writ of *feri facias* was tested on the first day of Hilary Term, 1825; and it was proved that Mr. Claughton had a one-third share in the Ashton Green colliery, which was in the county of Lancaster, and where there were goods and fixtures belonging jointly to him and his two partners, to more than three times the amount to be levied under this execution; and it was contended on the part of the plaintiff, that the sheriff should have levied on this joint property to the extent of one third.

The defence was, that partnership property could not be seized under a writ of *feri facias*, sued out against one partner only; and that, even if it could, a commission of bankrupt had been sued out against Mr. Claughton, in the month of March, 1824; and therefore, the property in these goods had passed to the assignees, as the writ was issued in January after an act of bankruptcy, and within two months of the suing out of the commission. The act of bankruptcy relied on was under the stat. 4 Geo. 3, c. 33. To substantiate this, it was proved, that Mr. Claughton was a member of Parliament, and that, on the 9th of December, an affidavit of Thomas Legh, Esq. stating that Mr. Claughton was indebted to him in the sum of 25,000*l.*, for money lent, was filed with the clerk of the declarations, and a summons sued out on the same day. It was also proved, that the summons was duly served on Mr. Claughton. And the witness, who filed the affidavit and sued out the summons, stated, that Mr. Claughton had not given any security under the act, or satisfied Mr. Legh's debt, in any way that he knew of; but that Mr. Claughton's bail having been rejected, no appearance was ever entered for him. To shew Mr. Legh a creditor to the amount of 100*l.*, one of the witnesses for the plaintiff stated in his cross-examination, that he knew Mr. Legh was a large creditor of Mr. Claughton's, and that, at one of the meetings under Mr. Claughton's bankruptcy, Mr. Claughton's counsel said, that if all his objections to the debt were allowed, it would still exceed 60,000*l.* The

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trading and petitioning creditor's debt were proved (Mr. Legh not being the petitioning creditor under the commission).

Tindal, S. G.—Is it sufficiently shewn, that Mr. Legh was a creditor, without his being called as a witness?

Lord TENTERDEN, C. J.—I think it is. His Lordship added: It is not material to this case, but I am not quite satisfied as to the interest which the sheriff might have sold under the execution. There is great difficulty in making the sheriff a tenant in common with the partners.

Tindal, S. G., elected to be

Nonsuited.

Tindal, S. G., *Reader*, and *Goulburn*, for the plaintiff.

Sir *J. Scarlett*, and *Tomlinson*, for the defendant.

[Attornies—*Long & Co.*, and *Redsdale*.]

This, as to the act of bankruptcy, was a case under the stat. 4 Geo. 3, c. 33, (now repealed) for which sect. 10, of the late bankrupt act, 6 Geo. 4, c. 16, is substituted.

By the stat. 6 Geo. 4, c. 16, s. 10, it is enacted, "That if any creditor or creditors of any such trader, having privilege of parliament to such amount as is hereinafter declared requisite to support a commission, shall file an affidavit or affidavits in any court of record at *Westminster*, that such debt or debts is or are justly due to him or them respectively; and that such debtor, as he or they verily believe, is such trader as aforesaid, and

shall sue out of the same court a summons, or an original bill and summons against such trader, and serve him with a copy of such summons, if such trader shall not, within *one calendar month* after personal service of such summons, pay, secure, or compound for such debt or debts, to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with two sufficient sureties, as any of the judges of the court out of which such summons shall issue shall approve of, to pay such sum as shall be recovered in such action or actions, together with such costs as shall be given in the same, and within one calendar month

next after personal service of such summons, cause an appearance or appearances to be entered to such action or actions, in the proper court or courts in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons, and any creditor or creditors of such trader to such amount as aforesaid may sue out a commission against him, and proceed thereon in like manner as against other bankrupts." See Arch. B. L. 270.

In the case of *Es parte Harcourt*, 2 Rose, 211, Lord Eldon, C. speaking of the act of bankruptcy under the stat. 4 Geo. 3, c. 33, says, "It has indeed been argued, that the act of bankruptcy introduced by this statute must of necessity be proved by a creditor, because it is constituted of circumstances which rest, and can rest only on his particular testimony. The creditor can alone prove that the debt has not been paid, secured, or compounded for, to his satisfaction. I certainly concede, that with reference to the negative circumstances which the statute requires, the evidence of a creditor must, in this particular act of bankruptcy, be admitted to that extent; but the necessity which enacts this admission, enacts the extent of it; and although you must admit him to prove what he alone can prove, yet he is not to be admitted to prove what can be established by the evidence of others."

With respect to taking partnership property under an execution sued out against one partner for

his separate debt, Lord Mansfield says, in the case of *For v. Hanbury*, Cowp. 449: "If a creditor takes out execution against one partner, as in Salk. 392, the vendee would be tenant in common;" and his Lordship cites the opinion of Lord Hardwick, in the case of *Skipp v. Harwood*, in the following terms: "If a creditor of one partner takes out execution against the partnership effects, he can only have the undivided share of his debtor, and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner." In *Heydon v. Heydon*, Salk. 392, Lord Holt lays down, that the sheriff must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner.

In *Taylor v. Fields*, 4 Ves. 396, it was held by the Court of Exchequer, that the separate creditor of a partner has no right against the joint property, farther than the separate interest of that partner, viz. his share upon a division of the surplus, subject to the accounts of the partnership; and the Court held, that the joint property of an insolvent partnership, taken in execution for a separate debt, could not be held against the joint creditors.

In *Es parte Hamper*, 17 Ves. 407, Lord Eldon says, that an individual creditor getting execution, might undoubtedly have laid hold of the joint effects at law, subject to an account, ascertaining the specific interest in such joint effects; and in *Waters v. Taylor*, 2 Ves. & B 300, his Lordship inquiring how a sheriff executes a writ un-

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der a judgment against one partner? Mr. *Cooke* (*amicus curiæ*) stated, that the way in which the sheriff executes the writ in practice, is by making a bill of sale of the actual interest. And in that case, Lord *Eldon* said, "If the Courts of law have followed Courts of equity in giving execution against partnership effects, I desire to have it understood, that they do not appear to me to adhere to the principle, when they suppose that the interest can be sold before it has been ascertained what is the subject of sale and purchase. According to the old law, I mean before Lord *Mansfield's* time, the sheriff, under an execution against partnership effects, took the undivided share of the debtor, without reference to the partnership account; but a Court of equity would have set that right, by taking the account and ascertaining what the sheriff ought to have sold. The Courts of law have now, however, repeatedly laid down, that they will sell the actual interest of

the partner professing to execute the equities between the parties, but forgetting that a Court of equity ascertains previously what was to be sold. How could a Court of law ascertain what was the interest to be sold, and what the equities depending upon an account of all the concerns of the partners for years." In the case of *Parker v. Pistor*, 3 B & P. 288, where a *fi. fa.* issued against one partner, the Court would not, at the request of the partnership creditors, give the sheriff time to return the writ, until an account could be taken of the claims upon the partnership; and the Court said, that the safest line of conduct for the sheriff to pursue, was to put some person in the possession of defendant's share as vendee, leaving him and the parties interested to contest the matter in equity, where a bill might be filed, stating that he had taken possession of the property, and praying that it might not be disposed of till all the claims were arranged.

Feb. 18th.

BURROWS, Gent. v. UNWIN.

Practice.—After the Jury have had the case summed up to them, and have retired, the Court will not permit them to see a treatise on the law of the subject, even with consent of parties, as they should state their difficulty to the Judge, and receive his direction as to the law.

CASE, for negligence of the defendant's servant.

Lord TENTERDEN, C. J., had summed up the evidence, and the Jury had retired, when they sent a message to his Lordship, desiring to have Selwyn's Law of Nisi Prius sent them from the library of the Court.

Lord TENTERDEN, C. J., asked the counsel on both

sides if they objected to its being sent, and they answered that they had no objection. However, his Lordship observed, "The regular way is, for the Jury to come into Court and state their question, and receive the law from the Court: and for the sake of precedent that course should be adopted now."

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The books were not sent.

Verdict for the plaintiff.—Damages, 1s.

Sir *J. Scarlett*, *F. Pollock*, and *Gunning*, for the plaintiff.

Brougham, for the defendant.

[Attornies—*Robinson & B.*, and *Brooksbank & F.*]

MACLEOD, M.D. v. WAKLEY.

Feb. 19th.

LIBEL.—The plaintiff was a physician, and the editor of a periodical work called "The London Medical and Physical Journal;" and the libel complained of was published in "The Lancet," also a periodical work, published by the defendant.

The number of the *Lancet* which was the subject of the present action, was published on the 19th of May, 1827, and tended to cast ridicule on the plaintiff, as the editor of the *London Medical and Physical Journal*.

In opening the case, Sir *J. Scarlett* was proceeding to read the following paragraph from a later number of the *Lancet*, published two days only before the trial. "*Macleod v. Wakley*.—The yellow Goth will be scarified by Mr. *Brougham* on Monday next, at the Court of King's Bench, at Westminster."

Whatever is fairly written of a work, and can be reasonably said of it, or of its author, as connected with it, is not actionable, unless it appear that the party, under the pretext of criticising the work, takes an opportunity of attacking the character of its author. In cases of libel, a subsequent publication, brought out even after issue joined, may be evidence to shew the motives of the party.

An admission signed by the defendant's attorney, consenting to admit the defendant to be editor of a periodical work called "The Lancet," is no evidence that the defendant was editor on a day subsequent to the date of such admission.

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Brougham, for the defendant.—I submit that this cannot be evidence. This was published after issue joined, and it can have nothing to do with any injury the plaintiff had sustained at the time of the bringing of this action.

Lord TENTERDEN, C. J.—I am by no means satisfied that what is published *at any time before* the trial, may not be evidence to shew the motive of the party; however late any thing takes place, it may be evidence of a previous intention as to a previous fact.

To prove that the defendant was the editor of the *Lancet*, the following admission was put in:—

“ In the King’s Bench.

Between Roderick Macleod, plaintiff,
 and

Thomas Wakley, defendant.

“ We hereby admit the above-named defendant to be the editor of a certain periodical publication, called the *Lancet*, mentioned in the declaration in this cause, and consent that the above-named plaintiff shall not be required to give evidence thereof on the trial of this cause. Dated this 13th day of February, 1828.

(Signed) Fairthorn & Lofty,
 King Street, City.”

The libel was read, and the plaintiff’s counsel wished to read the paragraph already stated, beginning “The yellow Goth.”

Brougham, for the defendant.—There is no evidence that the defendant, Mr. Wakley, was the author of that. We have only admitted him to be editor up to the 13th of February, and this was published afterwards.

Sir *J. Scarlett*, *contra*.—It is admitted, that Mr. Wak-

key was the editor, and it lies on him to shew that he is no longer so, especially as we can shew that the publication continues in the same form, and at the same shop.

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Lord TENTERDEN, C. J.—I do not think that I can hold that this admission can be extended to a publication after its date. I consider that the admission goes down to its date, but no further.

The evidence was rejected.

Brougham, for the defendant, contended, that the alleged libel only attacked the plaintiff as the editor of a periodical work, and was in fact only fair criticism: and he relied on the case of *Carr v. Hood*, 1 Camp. 355, n., and also on the case of *Hall v. Longman*, decided in the Exchequer very recently, and in which the doctrine laid down in the case of *Carr v. Hood*, was confirmed.

Lord TENTERDEN, C. J., (in summing up).—It has been stated on the part of the defendant, that the matter contained in this publication relates to the plaintiff only as an author; but still there is no doubt that a man who is an author, has a right to have his character protected, just the same as if he acted in any other capacity. However, notwithstanding that, whatever is fair, and can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable, unless it appear that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author; and then it will be a libel. That there is in this publication a great deal of ridicule, must be admitted by every one; and I think that there appears also to be some rancour: still, if you think that what is said here was fairly called for by what the plaintiff had done as the editor of another publication, the defendant is entitled to

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a verdict; but if you should think the remarks were not fairly called for, you will find for the plaintiff.

Verdict for the plaintiff—Damages 5*l*.

Sir *J. Scarlett*, *F. Pollock*, and *Patteson*, for the plaintiff.

Brougham, and *Kelly*, for the defendant.

[Attornies—*Poole & Co.*, and *Fairthorn & L.*]

Adjourned Sittings in London, after Hilary Term,
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BEFORE LORD TENTERDEN, C. J.

Feb. 29th.

Semble, that if a tenant pays taxes which he alleges ought to have been paid by his landlord, and afterwards pays rent for two years subsequently, without making any deduction, he cannot recover the amount in an action against the landlord. *Semble*, also, that a broker, who, when receiving rent under a distress, deducts a sum purporting to be for land-tax, is not to be considered as *allowing* the land-tax, so as to affect the landlord's right, but as merely, from not knowing how to act, consenting to receive the money without the sum deducted.

SAUNDERSON v. HANSON, Gent., &c.

ASSUMPSIT for money paid to the use of the defendant.—The plaintiff had been tenant to the defendant, and the action was brought to recover a sum of 6*l*. 15*s*. for land-tax and sewers-rates, which had been paid by the plaintiff during the tenancy, but omitted to be deducted out of the rent. A distress had been put in for one quarter's rent, and the broker who received the money under it, had deducted a sum of 18*s*. 4*d*., which it appeared was one of the usual amounts of the land-tax.—This, it was contended for the plaintiff, shewed that the land-tax was only paid on behalf of the defendant.

LORD TENTERDEN, C. J.—On the face of the receipt I should say, that the broker does not *allow* the land-tax. He does not know what to do on the subject, and he consents to receive the money without it.

but as merely, from not knowing how to act, consenting to receive the money without the sum deducted.

His Lordship then inquired, at what time the payments sought to be recovered were made? and was told, in 1825; and that the plaintiff had continued to hold and pay rent for two years afterwards.

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Campbell, for the defendant, said, that he should prove an agreement by the plaintiff to pay the land-tax and sewers-rate.

LORD TENTERDEN, C. J.—How can the plaintiff, after continuing to pay rent for so long a time subsequently to the payment of the taxes, be in a situation to maintain this action.

Thesiger, for the plaintiff, referred to *Stubbs v. Parsons* (a).

LORD TENTERDEN, C. J.—If a man goes on after paying taxes, and pays rent for a long time without deducting them, what can be presumed, but that he had no right to make the deduction? What man is safe if this is to be allowed? But it is said there was an agreement. Let that be proved.

The agreement was then proved as opened by Mr. *Campbell*, and the plaintiff was

Nonsuited.

Thesiger, for the plaintiff.

Campbell, for the defendant.

[Attornies—*G. W. Armstrong*, and in Person.]

(a) 3 Barn. & Ald. 516.

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A person who has preferred an indictment for an assault, from which he did not suffer any personal injury, and has succeeded in it, and received from the Treasury a portion of the fine imposed upon the defendant, is not entitled, in an action against the same defendant, to recover more than nominal damages. And it is the duty of an attorney when applied to to bring such an action, to dissuade the party from persevering in his intention.

JACKS v. BELL and Others.

ASSAULT.—It appeared that the defendants had been indicted for the same assault on the prosecution of the plaintiff, and were found guilty and fined; and that the plaintiff had received from the Treasury the sum of 100*l.*, part of the fines imposed. It did not appear that the plaintiff had suffered any personal injury.

Lord TENTERDEN, C. J., to the plaintiff's counsel.—Is a man to bring an action after he has succeeded in an indictment, and received a part of the fines imposed on the defendants?

Platt, for the plaintiff.—I am prepared to contend in support of his right.

Lord TENTERDEN, C. J.—I know that by law he may maintain the action; but what damages is he to recover? A Judge's certificate is necessary to enable the party to receive such fine; and I am sure that not one of the Judges upon the bench would have given the certificate in this case, if he had known that an action was afterwards to be brought.

The plaintiff's attorney was then called as a witness, and stated, that his bill for the prosecution amounted to the whole sum which the plaintiff had received from the Treasury, and added, in answer to a question from the Court, that when the plaintiff applied to him to bring the action, he neither persuaded him to go on, nor dissuaded him from it.

Sir *J. Scarlett*, for the defendants.—This mode of proceeding is quite unexampled in my experience. His Lord-

ship, I am sure, will say, that the Courts never grant certificates for the receipt of any part of a fine, if any action is brought for the same cause. In this case, as there is no proof of any personal injury, one farthing damages will be quite sufficient, as a plaintiff should not be encouraged to bring such an action, or an attorney to assist him in so doing.

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Lord TENTERDEN, C. J.—In this case there must be a verdict for the plaintiff; but the question will be, as to the amount of damages. The parties have been indicted, and now an action is brought against them. Here is a twofold proceeding—a double harass and a double vexation for one and the same offence. In actions for assaults, Juries do not in general confine themselves to damages for the personal injury sustained. I do not remember any instance in which a party has brought an action after having preferred an indictment, and received a portion of the fine. It does not appear in this case, that any personal injury has been sustained. You will therefore say, under these circumstances, what damages you think ought to be given to the plaintiff.

The Jury found for the plaintiff.—Damages one farthing.

Lord TENTERDEN, C. J.—I am really sorry that this action has been brought, because it will operate to prevent the Judges from granting certificates, to enable prosecutors to receive part of the fines imposed upon defendants.

His Lordship then observed to the plaintiff's attorney.—You say in your evidence, that you neither persuaded nor dissuaded the plaintiff, when he applied to you on the subject of this action. In that respect you did not do

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your duty. It was your duty to tell him, that he ought not to bring the action.

Platt, for the plaintiff.

Sir *J. Scarlett*, *Denman*, C. S., and *Goulburn*, for the defendants.

March 4th.

BRADLEY v. WATERHOUSE and BRIGGS.

A parcel containing two hundred sovereigns inclosed in six pounds of tea, was sent by coach, and paid for as of ordinary value, both the party sending and the owner of the parcel being aware of a notice by the coach proprietors, limiting their responsibility to 5*l*.; the parcel was stolen by one of the porters of the coach, while it was standing in the street at a manufacturing town in the course of its journey:— In an action to recover the value from the coach proprietors the defendants had a verdict, on the ground, that the loss was occasioned by the improper mode in which the parcel had been committed to their care.

CASE to recover damages for the loss of a parcel, containing six pounds of tea and two hundred sovereigns.— The plaintiff was a banker, residing at Ashbourne in Derbyshire, and the defendants were the proprietors of the Manchester Defiance coach, which passes through Ashbourne. The tea and the sovereigns were sent by the plaintiff's sons, who were grocers and tea dealers in London. The sovereigns were inclosed in paper, and put with the tea into a bag, and the whole was covered with a wrapper. Twopence was paid for the booking, and two shillings for the carriage, being the sum payable for an ordinary parcel of the same size and weight, without any reference to the value. The plaintiff's sons had been in the habit, for several years previously, of sending him money in similar parcels, to the amount in the course of a year of 15,000*l*. or 20,000*l*. The parcel was stolen by one of the porters attending the coach at Leicester, and he was tried for the offence and transported. It appeared to have been the practice to change the guard at Leicester, at which place the coach arrived at six in the morning; and the coach was left in the street there for the space of about half an hour. If any thing was paid for according to the value, it was particularly noticed in the way-bill, and the new guard was told to take particular care of it. After the loss, the defendants changed their plan, and the same guard went all the way through to Manchester. Parcels containing money to be sent to London, were frequently

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brought by the plaintiff's servants to the booking-office at Ashbourne; but the book-keeper refused to take them as ordinary parcels, and the servants waited and delivered them themselves to the coachman. Both the party sending the goods, and the plaintiff, were aware of the notice by which the defendants restricted their liability to parcels of 5*l.* value. The defendant Briggs, in a conversation with a friend of the plaintiff's, after the trial for the robbery, said, that he would wait on him in London and settle the action, and urged him to persuade the plaintiff to remit a portion of the amount, as he did not pay any insurance, adding, that he would make the guard pay a part for his negligence, as he had no business to leave the coach to the porters. On one occasion, when the plaintiff's servant took a parcel with money to the office at Ashbourne, the book-keeper told him that they would not be liable for such a parcel, if it was lost, unless it was paid for according to its value. The servant told this to the plaintiff, and he said, in reply, "O never mind; they will talk, but I must run the risk."

Tindal, S. G., for the plaintiff.—The 5*l.* notice does not extend to protect the coach proprietor against misfeasance, either of himself or his servants, or against gross negligence. There are several cases to this effect. There was one lately decided in the Court of Common Pleas; and in this Court, there is the case of *Garnet v. Willan* (a). There the change of the nature of the conveyance was considered, as taking the case out of the effect of the notice; and in the still later case of *Sleat v. Fagg* (b), the same doctrine was laid down. It may be said, that there was concealment with respect to the two hundred sovereigns; but the defendants are wrong doers, and cannot avail themselves of the misconduct of the other party. It was so said in the case of *Sleat v. Fagg*, and there was no more concealment in this case than in any other. If there was not

(a) 5 B. & A. 53.

(b) 5 B. & A. 342.

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the exercise of ordinary care and diligence, the state of the parcel will make no difference with regard to the rights of the parties.

Sir *J. Scarlett*, for the defendants.—There is no consideration for the promise which has been spoken to as made by the defendant *Briggs*. A master has great reason to complain of those who constantly expose his servants to a temptation under which they may eventually fall. The case of *Sleat v. Fagg*, had nothing to do with the notice, it was founded on a special contract to send by the mail, and the defendant sent by another coach, which he had no right to do, because a person may choose to trust the mail, when he would not trust to any other conveyance. I admit that a case of very gross negligence may not be protected by the notice. The plaintiff in this case has imposed on the carrier. I remember a case of a Jew who sent dollars and gold packed up with a quantity of apples, from Stamford to London, and the Jury gave a verdict for the defendant, on the ground that the plaintiff had himself exposed the property to that risk which was the cause of the disaster. A carrier has a right to say, if you send money, you do it at your own risk; the responsibility is too great for me, and I will not undertake it. This is a perfectly reasonable protestation, and a carrier is bound to make it. A man may choose notwithstanding to send money by coach. The words of the notice are "on any account whatsoever." If a man wishing to send money in a parcel thrusts it on the carrier in defiance of the notice, he cannot claim damages if a loss should happen. No extraordinary negligence has been proved, but, on the contrary, it appears from the evidence that the business was conducted in the ordinary way. It is not the practice to call over the parcels when the guard is changed. I submit that the case, as proved, goes to discharge the defendants altogether. The promise made by the defendant *Briggs*, is not binding, as it did not proceed upon a

knowledge of all the circumstances. If the plaintiffs had not concealed the nature of its contents, special attention would have been paid to the parcel. The defendants have also been at the expense of prosecuting.

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Tindal, S. G., in reply.—Bradley's saying that he must run the risk, means, that he was aware of the notice, and must run such risk as the law would throw upon him; but he could not mean that he would run the risk of extraordinary negligence on the part of the defendants. The coach was left for half an hour without protection, in a populous manufacturing town. This ought not to have been the case, and the defendants themselves have discovered the impropriety of it, for, ever since the loss, they have made the guard go the whole of the journey.

Lord TENTERDEN, C. J.—I own it seems to me that the case may be considered as if the notice was not an absolute bar, as the defendants must be supposed to have known that the plaintiff was in the habit, from the way in which the parcels were made up, of sending other things besides goods. And then that may introduce the question, whether there has been gross negligence on the part of the defendants; but you will also consider, whether it does not introduce another and preliminary question; viz. Has the plaintiff brought this loss upon himself, by his own manner of conducting his business. The way in which the loss occurred, does not appear to have been discovered for a great length of time. The particular negligence imputed to the defendants, is the leaving the coach in the street for half an hour. Now, if during that time a stranger had robbed the coach, it might have been said to the defendants, you ought to take care that thieves in the street do not steal the parcels which are committed to your custody; but no man can be sure that he shall protect himself against the dishonesty of his own servants. It is fit to consider, in such a case, whether the party com-

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plaining, or seeking to charge the carrier, has or has not been the cause of the servant's dishonesty. In the present case, the mode in which the goods were packed, might have that effect. The weight would be notice of the nature of the contents, and afford a temptation to the servants to purloin. It is said that the defendants were conscious, from the statement of Briggs, that they were bound to make good the loss. But Briggs only says that he will "*settle it*," he does not say that he will pay the amount. And this he says, that he individually will do, and not he and Waterhouse the other defendant. This looks as if he thought, that he, from living at Leicester, was the party who would be liable; and if so, on the effect of his admission he alone would be responsible. If, however, he acted under a misapprehension of the responsibility which the law would cast upon him, his admission is not such as can be used with effect against him. It appears, too, that he talks of it as a matter of compromise. The question comes to this: has this been a case of gross negligence on the part of the defendants, or has the loss been brought on by the plaintiff's own conduct in sending valuable articles under such a slight disguise? If you are of opinion that the latter was the case, then you will find your verdict for the defendants.

Verdict for the defendants.

Tindal, S. G., *Marryatt*, and *Hill*, for the plaintiff.

Sir *J. Scarlett*, and *F. Pollock*, for the defendants.

[Attornies—*Young & V.*, and *T. Leigh*.]

See the cases of *Langley v. Brown*, 1 Moore & Payne, 583; and *Mayhew v. Eames*, ante, Vol. 1, p. 550.

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FENWICK v. ROBINSON.

April 17th.

ACTION against the defendant, as secretary of the Patriotic Insurance Company, on a policy of insurance on the ship *Bolivar*, valued at 4000*l.*, on a voyage from Bristol to New York, during her stay there, and back to her port of discharge. The vessel sailed from Bristol to New York, and discharged her cargo there, and on her return to England met with a disaster, and was obliged to be repaired. The question in the cause was, whether the rule of Lloyd's, of deducting one-third new for old, where a ship is injured after she has been one voyage, applied to the case of the *Bolivar*, or, in other words, whether the passage from New York to England was to be considered as a second voyage, or only as a part of the first. Several witnesses were called on the part of the plaintiff, who said, that the passage from England to New York, and the passage from New York to England, constituted together only one voyage; and some of them added, that they had settled averages in cases of a similar description, and had not allowed the deduction.

The witnesses who were called on the part of the defendant, stated, that it is a voyage when a vessel has earned freight, or been in a situation to earn it; and some of them stated, that they had known instances in which ships sent in ballast to Bourdeaux for wine, and to Sunderland for coals, were considered, when coming back, as on a second voyage.

F. Pollock, for the plaintiff, contended, that as the words of the policy were "on a voyage from Bristol to New York," "and back to her port of discharge," the underwriters were bound by that description to pay the whole without deduction. He submitted that the question was, whether there was such an invariable rule on the subject, that the plaintiff must be taken to have contracted

If a new ship is insured, "on a voyage from Bristol to New York, during her stay there, and back to her port of discharge," and on her passage back from New York to England, sustains an injury, which requires her to be repaired, the underwriter is not entitled to deduct one-third new for old, as the whole is to be considered only one voyage.

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on the faith of it; and that this could not be the case, when it was proved that averages had been settled in opposition to it.

Lord TENTERDEN, C. J. (to the Jury)—The only question is, whether or no the defendant is to pay the whole expense of the repairs, or is to be permitted to deduct one-third. On the face of the policy, nothing appears about this deduction, and therefore the defendant, who seeks to make it, is bound to shew that he has a right to do so. He founds his claim on a supposed custom. That there is a custom to deduct one-third is clear and indisputable; and it is founded upon the supposition, that there is a difference between new and old materials; and to avoid discussion in each particular case, it is agreed that the deduction shall be of one-third. I am as great a friend to general rules as any one. But it is impossible to lay down any general rule, which may not, in some cases, be productive of hardship. It is admitted that this rule is not absolutely universal, for if the loss happens on a first voyage, the underwriter is not entitled to the deduction. And that introduces the question, whether, in this case, it was her first voyage in which the ship became injured. All the witnesses for the plaintiff agree in considering the whole as one voyage; some of them say, that they have actually settled averages in cases similar to the present, without allowing the deduction. Many questions were put to them, in cross examination, as to the rule in long voyages; and they appeared by no means prepared to give very accurate evidence on the subject. Some thought the policy would regulate it, some the charter-party, and some considered that it was a question of time. Perhaps it may not be unfit or unreasonable to consider whether the voyage out and home was not *all one adventure*. The policy is all one, and the contract is all one, and it seems to me to be all one adventure. The defendant's witnesses say, that it is a voyage when a vessel has earned freight, or is

in a situation to earn it; and some of them, that where a vessel is sent in ballast to a particular place, for a cargo, and is injured in coming back, the third is to be deducted as on a second voyage, and they also add, that they have settled averages on that principle. There is therefore contradictory evidence on the part of the plaintiff and defendant. The witnesses for the plaintiff are more in number than those of the defendant. But it is a question on which you may have some personal knowledge. I think the observation correct, which was made on the part of the plaintiff, that, inasmuch as the policy does not in its terms make any provision on the subject, the defendant must make out the practice clearly to your satisfaction; and that, if he has not so done, he cannot be considered as having brought himself within the rule.

The Jury found for the plaintiff, saying that they considered it as all one voyage.

F. Pollock, and *Alderson*, for the plaintiff.

Sir J. Scarlett, and *Campbell*, for the defendant.

[Attornies—*Thompson, B. & S.*, and *Oliverson & Co.*]

SLATER and Others v. WEST.

April 19th.

ASSUMPSIT, on a bill of exchange, for 45*l.*, dated the 10th of July, 1827, drawn by one *Darby*, on and accepted by the defendant, payable at two months after date. Plea, the general issue.

On the morning of the 5th of September, 1827, a stran-

A trader in London took a bill of exchange in part payment for goods, of a person representing himself to be a tradesman from the country, and to have

been recommended by a customer, and sent the goods, in consequence of an order from the buyer, to a public-house, which was not a booking-office, without making any inquiries except as to the respectability of the acceptor. The bill turned out to have been stolen, and, in an action by the trader against the acceptor, the defendant had a verdict, on the ground that the plaintiff had taken the bill out of the ordinary course of trade, and under circumstances which ought to have excited his suspicion.

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ger of respectable appearance came to the warehouse of the plaintiffs, who were in the Scotch and Manchester trade, and stated that his name was Symes, that he was a tailor at Taunton, and that he was recommended to them by a Mr. Combes, of that place, (who, it appeared, had extensive dealings with the plaintiffs). He selected a quantity of woollen cloths and velveteens. While he was making the selection, he asked the managing clerk if they would have any objection to take a bill in part payment. The clerk replied, that they should not, provided the parties were respectable, and requested that he would leave it with them for a time, that they might make the necessary inquiries. Symes went away for about an hour, and inquiries, during his absence, were made by one of the plaintiffs, as to the goodness of the bill; and on Symes's return, he was told that he might have the goods. They amounted to 56*l.* 2*s.* Symes, in addition to the bill, paid 11*l.* 2*s.* in cash, and directed the goods to be sent to the Rose and French Horn, in Wood Street, about five minutes' walk from the plaintiffs' premises. They were sent in the course of the same day. The Rose and French Horn was not a booking-office, but an ordinary public-house. When the porter arrived there, he deposited the goods in the passage (a), and Symes, who was not known there, came out of the parlour with another person, and gave the porter something to drink. Symes himself signed the porter's book. The porter suspected that all was not quite right, but had not an opportunity of communicating his suspicions to the plaintiffs till the following morning, when, in consequence of what he told them, they sent him to the

(a) It appeared, that the direction, "Mr. Thomas Symes, Taunton," was covered with brown paper fastened down by skewers; and some observations were made on this circumstance, as suspicious; but it was proved to be the

practice of the trade so to cover the directions of the packages sent out, in order that thieves may not see, while the goods are being carried through the streets, to what place they are going.

public-house to make inquiries. Symes, soon after the departure of the porter, took away the goods in a truck. The bill in question was lost, soon after it was drawn, from the custody of the brother of the drawer, who was going to get it discounted. On the 10th of August, (four or five days after the loss), an advertisement was inserted in the *Morning Advertiser* newspaper, stating the loss of the bill, and the names of the parties to it, and requesting that it might be brought to Arabella Row, Pimlico. It was not proved that the plaintiffs were in the habit of reading the *Morning Advertiser*. They did not make any inquiries as to the truth of Symes's representation, nor did they ask him for a reference to any person in London.

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Gurney, for the defendant, contended, that the plaintiffs were not entitled to recover. The inquiry as to the respectability of the parties to the bill, is immaterial to the consideration of this case. The important inquiry is, whether there was such a person as Mr. Thomas Symes, of Taunton. In the case of *Gill v. Cubitt (b)*, the Judge, the Jury, and the Court of King's Bench afterwards, held that a person who takes a bill of exchange, should make inquiries as to the person who brings it, or shew that he is acquainted with him. Any swindler may pick up the name of a customer. A person who loses a bill, is entitled to require that the party to whom it is offered should make due inquiry, before he takes it. Symes did not bring any letter from Mr. Combes, of Taunton. It is not the mode of doing business, that a perfect stranger is to come into a warehouse, and his word to be taken, as to who and what he is, without any inquiry being made into the truth of his statements. The question is, who is to be at the loss of the amount of this bill; the drawer, who has been guilty of no negligence, or the plaintiffs, who, as I

(b) *Ante*, Vol. 1, pp. 163, 487.

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submit, have been guilty of great negligence, and have conducted their business in a very incautious way.

Brougham, for the plaintiffs.—The case of *Gill v. Cubitt*, it is true, decides, that you must ask questions of the bearer, if you are not acquainted with him; but I deny that you are bound to make inquiries of other people about him. The statement made by Symes, that he knew Mr. Combes, of Taunton, was something whereby to identify the person, and rendered it highly improbable that he should be any other than the person he represented himself to be. If Symes had represented himself as living at Paddington, where the acceptor of the bill did live, the plaintiffs would have made inquiry about him; but he stated that he lived at Taunton. According to the argument on the other side, they should have stopt the transaction for three or four days, till they had written and received an answer. This might be very well in an extraordinary transaction; but the circulation of paper could not go on, if it were considered to be requisite in those of an ordinary description. As to the advertisement of the loss, the *Morning Advertiser* is not the paper in which a notice, as regards the plaintiffs who are respectable Manchester warehousemen, ought to have been inserted. It is, with reference to their situation, the most obscure that could have been selected. The porter might have his suspicions, but he did not communicate them to his employers at the time. It appears that Symes was a person of respectable appearance. I submit, under all the circumstances, that nothing was done by the plaintiffs, which was not in the ordinary and regular course of business; and therefore that they are entitled to recover on the bill.

LORD TENTERDEN, C. J. (in summing up, said)—There is no proof that the newspaper ever came under the view of the plaintiffs. The plaintiffs have given value for the bill, but it is contended, that they are not entitled to reco-

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ver upon it, because it is said, that if any person takes a bill of exchange out of the ordinary course of trade and business, and under circumstances which ought to excite suspicion in the mind of a reasonable man, knowing how the affairs of the world are conducted, he cannot afterwards sue upon that instrument. This doctrine is of modern origin. I believe that I was the first Judge who decided this point at *Nisi Prius*. The Court to which I belong, confirmed my decision, and the other Courts have, I believe, acted on the same principle. But in every case of this description, the question is one which ought to be guardedly and carefully considered. We are to take care, on the one hand, that we do not prevent the circulation of paper, which circulation is so essential to the commerce of the country; and, on the other hand, that we do not allow persons to take it under the circumstances I have mentioned, because, by so doing, we shall give encouragement to thieving, which has been carried on lately to a very considerable extent. It is our duty, bearing both these things in mind, to give our attention to the evidence in the case. I think our judgment must be confined to the evidence of that which passed in the first instance, at the plaintiffs' warehouse, because, although the porter, after he had delivered the goods, might have his suspicions excited, yet he did not the same day communicate his suspicions to the plaintiffs. As to the brown paper being placed to cover the direction, it struck me, at first, as extraordinary, but it turns out not to be so, as connected with the evidence of the practice of the plaintiffs and another house. It seems that it was done in the ordinary course of business. It appears that the Rose and French Horn was not a booking-office, and was situate very near the warehouse of the plaintiffs; and it is perhaps a little extraordinary that the plaintiffs should not have known that it was not a booking-office. But the porter says, that those offices are so frequently altered, that it was not easy to know. If the manner in which the bill was offered by

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a perfect stranger, making verbal representations, and desiring the goods to be sent to such a place, but betraying no consciousness of suspicion, and buying to a larger amount than the amount of the bill, leads you to conclude, that the plaintiffs ought to have had their suspicions excited, then I am of opinion that you should find your verdict for the defendant. This case differs from those which have been already decided on the subject. There seems to be a difference between the cases of a purchase of goods and the discounting of a bill, by a bill broker. There was a case tried here (*a*), in which a person presented a check to a tradesman, in payment for a small parcel of goods, and received the remainder in money. That, also, was very different from the present; and, with respect to the cases against the bankers, they were cases of notes of a large amount (*b*). If you think that the plaintiffs took this bill out of the ordinary course of business, and under circumstances which should have excited their suspicion, that the person giving it was not entitled to it, then you will find your verdict for the defendant. But unless you can come to that conclusion, then, as the plaintiffs have given full value for the bill, you will find your verdict for them.

Verdict for the defendant.

Brougham, and *Platt*, for the plaintiffs.

Gurney, and *Chitty*, for the defendant.

[Attornies—*James & W.*, and *Towers*.]

ON the first day of the ensuing Easter Term, *Brougham* moved for a new trial.

LORD TENTERDEN, C. J. said—The case was one which

(*a*) *Downe v. Halling* and Others, *ante*, Vol. 2, p. 11.

(*b*) *Snow v. Peacock*, *ante*, Vol. 2, p. 215; and *Snow v. Leatham*, *Id.* p. 314.

was peculiarly proper for the consideration of the Jury. I do not say, that, if they had found their verdict the other way, I should have been dissatisfied.

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SLATER
v.
WEST.

BAYLEY, J.—The circumstance of the man's directing the parcel to be sent at a given hour, was one to excite suspicion. The plaintiffs might also have looked into the Directory, to see if the public-house was a booking-office. I think that this verdict, so far from being a check to the circulation of bills, will tend to prevent a person meditating fraud from carrying it into execution.

LITLEDALE, J.—I should have been satisfied if the verdict had been the other way, but it was peculiarly a matter for the consideration of the Jury.

Rule refused.

Adjourned Sittings in London, after Easter Term,
1828.

BEFORE LORD TENTERDEN, C. J.

MUDIE v. BELL and Others.

May 29th.

TRESPASS.—The declaration stated, that the defendants broke and entered a certain *dwelling-house* of the plaintiff's and made a great noise and disturbance *therein*, and stayed &c., and forced and broke open *part of the leads and roof of the said dwelling-house*, and broke to pieces &c., divers doors, windows &c., by means of which

A declaration which alleges, that A. B. broke and entered the *dwelling-house* of the plaintiff, and made a disturbance *therein*, and broke open *part of the leads and roof of the said dwelling-*

house, is not supported by proof of breaking an external rail fence, and trespassing on leads forming the roof of a counting-house, occupied by A. B., but used as an easement to the house of the plaintiff.

1828.
MUDIE
v.
BELL.

premises the plaintiff and his family were greatly disturbed &c., in the peaceable *possession of the said dwelling-house* &c. Plea—Not Guilty.

It appeared that a counting-house, occupied by one of the defendants, extended behind the plaintiff's house, so that the roof of it, consisting of leads with a skylight, came just under the windows of the plaintiff's kitchen. During the occupation of the plaintiff's house by the person under whom he held it, the leads of the roof of the counting-house were used as an easement to that house, and a meat-safe was erected on them; but they had been repaired by those under whom the defendants claimed. The injury complained of was, the breaking of an external rail fence, and trespassing on the leads.

LORD TENTERDEN, C. J., was of opinion, that, upon this evidence, there was no proof of a breaking of the plaintiff's *dwelling-house*, and therefore directed a

Nonsuit.

Brougham, and *Parke*, for the plaintiff.

Campbell, *F. Pollock*, *J. Williams*, *Crompton*, and *Steer*, for the respective defendants.

[Attornies—*Acton*, and *Woodward & S.*]

IN the ensuing Trinity Term, a motion was made for setting aside the nonsuit; but the Court were of opinion that the decision at *Nisi Prius* was correct, and refused to grant a rule.

1828.

PHENEY v. JONES, Esq.

May 29th.

ACTION against the Marshal of the King's Bench. The bill (of the 4th of December, 1827,) stated that the plaintiff, in Michaelmas Term, 8 Geo. 4, recovered against one George Price, Esq. 229*l.*, for damages, for the non-performance of certain promises, whereof the said George Price was convicted; and thereupon on Wednesday next after fifteen days of Saint Martin, in Michaelmas Term, 8 Geo. 4, the said George Price then being personally present in the said Court, &c. was then and there in and by the said Court, &c., at the prayer of the said plaintiff, *committed to the custody of the said defendant, then being Marshal, &c. in execution, for the damages, &c. as by the record of the commitment remaining in the said Court, &c., more fully appeared*; by virtue of which said commitment the said defendant, so being such Marshal as aforesaid, kept and detained the said George Price in his custody, in execution for the damages aforesaid, at the suit of the said plaintiff, until the said defendant, so being, &c., not regarding the duty of his said office as Marshal, &c., on the 1st day of December, &c., freely and voluntarily suffered the said George Price to escape and go at large, &c. Plea, the general issue.

In an action against the marshal for an escape, the allegation in the record in the original action is *prima facie* evidence that the party was committed to his custody.

The order for the commitment of Price was produced, and the record in the original action was read, which contained an allegation of his commitment, as averred in the bill: but no witness was called who had seen him in the Marshal's custody. It was proved, that, on the 4th of December, he was residing in a house at Walworth.

Sir *J. Scarlett*, for the defendant.—There is no evidence that Price ever was in the custody of the Marshal, there is only evidence of the order for his commitment.

Campbell, on the same side.—I have never known this

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PHENEY
v.
JONES.

evidence omitted. The fact is generally proved by the clerk of the papers. There is nothing to shew that Price was in custody at the time of the escape.

Lord TENTERDEN, C. J.—By the record it appears that on Wednesday after fifteen days of Saint Martin, in Michaelmas Term, the party was committed to the custody of the Marshal. That is *prima facie* evidence, and unless you can alter it, the plaintiff will be entitled to a verdict.

Sir J. Scarlett.—It is only a fiction of law.

Lord TENTERDEN, C. J.—I think it is *prima facie* evidence. But I will give you leave to move the Court upon the subject.

Verdict for the plaintiff.

Brougham and *Busby*, for the plaintiff.

Sir J. Scarlett and *Campbell*, for the defendant.

[Attornies—*Smithson & Co.*, and *Rogers & Son.*]

IN the ensuing Trinity Term, Sir James Scarlett moved in pursance of the leave given, but the Court refused to grant a rule.

1828.

BOOTH v. GROVER.

May 29th.

ASSUMPSIT, on several promissory notes.—The declaration stated, that the defendant made them, "*his own proper hand being thereon subscribed.*"

It appeared that the defendant's son drew them in his father's name and by his authority, because the defendant himself could not write well enough.

R. V. Richards objected, that the notes could not be read, because they were stated to have been drawn by the defendant in *his own proper hand*, and it appeared from the evidence, that they were not drawn by him, but by his son.

Lord TENTERDEN, C. J., was of opinion, that the words might be considered as surplusage.

The case went on, and, eventually, a Juror was withdrawn.

Steer, for the plaintiff.

R. V. Richards, for the defendant.

[Attornies—*Lott*, and *J. B. Lawrence*.]

In the case of *Levy v. Wilson*, 5 Esp. 180, the declaration stated, that the party indorsed the bill, '*his own proper hand being thereon subscribed,*' and it appeared, that it was indorsed *per procuration*, this was held a fatal variance; but in the case of *Helmsley v. Louder*, 2 Camp. 450; where, on a similar declaration, it appeared that the

indorser's wife wrote *his name* by his authority, it was held that this was no objection after a promise to pay; and Lord *Ellenborough* said, that he thought it would be too narrow a construction of the words, *own hand*, to require that the name should be written by the party himself.

If the declaration in an action against the maker of a promissory note, state, that the defendant made it "*his own proper hand being thereon subscribed,*" and it appear that the note was drawn by his son in his name and by his authority, the variance will not prevent the reading of the note, but the allegation may be rejected as surplusage.

1828.

Adjourned Sittings at Westminster, after Easter Term, 1828.

BEFORE LORD TENTERDEN, C. J.

June 3rd.

PATON v. DUNCAN.

If one undertake to furnish a new history of a country, this is not performed by his furnishing a book, which is a translation of an entire previously existing history, with his own continuations and some additions.

THIS action was brought to recover the sum of 2*l.* 4*s.* being the price of a book sold by the plaintiff to the defendant. It appeared in evidence, that the defendant had subscribed his name in the plaintiff's subscription book, for one copy of "a new History of Scotland, by James Hakewell Esq.," which was the book in question. It also appeared, that the defendant had paid part of the price of the book, (2*s.* 6*d.*) as earnest, and that the book consisted partly of a *translation* of Buchanan's History of Scotland, and partly of an original continuation by Hakewell. The proportion of the continuation to the translation did not appear, but it was proved that the defendant had insisted on the plaintiff's taking back the book, which he refused to do.

Campbell, for the defendant.—I submit that the plaintiff must be called. By the agreement, he is to furnish the defendant with a new History of Scotland, and the book which he actually sends is a translation, in great part, of a well known history already existing. Perhaps the defendant would not have subscribed for the work, had he known that it was to consist mainly of a translation of Buchanan's book; and it appears that he offered to return the book, as he was at liberty to do on discovering of what it consisted.

Brougham, contra.—A history must necessarily be a compilation of matters already in existence somewhere;

and the province of the historian is, merely to collect together all the facts and authorities which bear upon the matter on which he writes. It frequently happens, that it is indispensable that a historian should translate into the language in which he is writing, a history written in a language less known; and the incorporation of this with his own composition will certainly not make his book the less original as a history, or disqualify it for being stiled a new history. Such was the case with Buchanan's work, and such is, and must necessarily be, the case with the best histories.

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PATON
v.
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Lord TENTERDEN, C. J.—I think, when a person undertakes to furnish a new history of a country, the undertaking is not performed by his furnishing a book which commences with the translation of an entire history, already existing and extensively known, as Buchanan's book certainly is, and then giving his own additions and continuation. It may be a new edition of the original work, with additions, but it is not a new history. The plaintiff must be called.

Nonsuit.

Brougham, and ———, for the plaintiff.

Campbell, for the defendant.

[Attornies—*J. Young*, and *Hurd & J.*]

1828.

*Second Sittings in London, in Trinity Term,
1828.*

June 18th.

MARGETSON v. AITKEN.

If a defendant has entered into a deed of composition with his creditors, containing the usual clause of release, and the plaintiff has executed the deed as a creditor for a certain sum, that is a good defence to an action by the plaintiff as indorsee of a bill to a larger amount, of which the defendant was indorser, and which then lay dishonoured, in the plaintiff's hands. But it is no defence as to two similar bills, also of larger amount, which the plaintiff had paid away, and which were then in the hands of third parties.

If, after a bill is dishonoured, the indorser offers to pay the holder so much in the pound, on the amount:—*Seemle*, that this dispenses with proof of the notice of dishonour.

ASSUMPSIT by the plaintiff as the indorsee, against the defendant as the indorser, of three bills of exchange, amounting together to 41*l.* 13*s.* 6*d.* There was no proof of any notice of dishonour, but a witness proved, that after the bills had become due, the defendant offered to pay the plaintiff a composition of eight shillings in the pound, on the amount of them.

The defence was, that after these bills had been given, but before two of them became due, the defendant had compounded with his creditors, and that the plaintiff had executed the deed of composition; the plaintiff's debt being there stated to be 27*l.* However, it also appeared, that the two bills that had not become due at the time of the executing of the deed of composition, had been indorsed over by the plaintiff, and were not then in her hands; but that the other bill, which was for 10*l.*, was then in her hands, as a dishonoured bill.

Gurney, for the defendant.—This deed of composition is an answer to this action, for it is not competent to a party to execute a deed of composition as a creditor to a certain amount, and then afterwards claim a larger debt. In this case the plaintiff has represented herself as a creditor for 27*l.*; and having done so, if she is allowed to recover more, it is a fraud on all the other creditors. As to the notice of dishonour, the most that is in evidence is an offer of a composition, which is not enough.

LORD TENTERDEN, C. J.—The utmost effect that can

be given to Mr. *Gurney's* argument, and to the deed, is, that the plaintiff releases whatever debt is then due to her; but I am of opinion, that that deed cannot be taken as a release by the plaintiff as to bills then outstanding undishonoured in other hands. It does not, I think, apply to two of the bills. As to the remaining bill, I think that the plaintiff cannot recover on it, as that was dishonoured at the time of the executing of the deed. With respect to the offer of the composition dispensing with proof of the notice of dishonour, Mr. *Gurney* may move to enter a nonsuit, if he should, upon consideration, think fit to do so; my opinion, as at present advised, is against him. I am inclined to think it enough.

1828.
MARGETSON.
v.
AITKEN.

Verdict for the plaintiff. Damages—31*l*.

C. F. Williams, and *Curwood*, for the plaintiff.

Gurney, for the defendant.

[Attornies—*S. Sharp*, and *Drew*.]

Adjourned Sittings in London, after Trinity Term,
1828.

SHERWOOD v. ROBINS.

July 9th.

MONEY had and received. Plea, the general issue. The plaintiff had purchased a reversionary interest, which

On a sale of a reversionary interest, with the usual condition, that no error of

description &c. should vitiate the sale, but a compensation be allowed; the reversion was described as absolute, on the death of a person aged sixty-six. In fact, the person was only sixty-four, and the reversion was not absolute, as the property would be divided if he left more children than one:—Held, that this sale was void, and that the offer of a compensation would not support it: but if it had been a mere difference of the age, *semble*, that it would have been otherwise.

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SHEERWOOD
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was described at the time of the sale, as follows: "The absolute reversion to 2000*l.* principal money, receivable on the demise of a gentleman upwards of sixty-six years old. It is secured on large freehold estates near York. The reversion is not subject to any contingency." After the plaintiff had made this purchase, it was discovered, that the vendor's father was sixty-four, instead of sixty-six years of age, and that the sum of money was to be divided at the death of the vendor's father, among such of his children as might be then living, so that if, at the time of his decease, the vendor's father should leave any other child besides the vendor, such child would be entitled to a share of the money. As soon as this was pointed out to the defendant, he relied on the sixth condition of the sale, by which it was provided that, "if any mistake or omission shall be discovered in the description of the property, or any other error whatever shall appear in this particular, such mistake, omission, or error shall not vitiate the sale, but a compensation or equivalent shall be given or taken, as the case may require." Under this condition, the defendant offered to make a reasonable compensation.

For the plaintiff it was contended, that although this might not be a misdescription wilfully made by the defendant, who was merely the auctioneer; yet, that if his employer instructed him to make such a representation, knowing it to be untrue, that would vitiate the sale.

For the defendant it was contended, that this was a mere accidental error.

Lord TENTERDEN, C. J., left it to the Jury, to say, whether the misdescription was wilful, or merely an error.

The Jury found that it was a wilful misdescription, and returned a verdict for the plaintiff.

Lord TENTERDEN, C. J.—I left this question to the Jury, because both sides rested their case upon that point;

but I think that it is immaterial. If it had been a mere difference of age, a compensation might be correctly calculated; but that can never be where there is the additional contingency as to the number of children the party may have at his death. No one can estimate that.

1828.
SHERWOOD
v.
ROBINS.

Sir *J. Scarlett, Campbell, and Comyn*, for the plaintiff.

C. F. Williams, and Ryland, for the defendant.

[Attornies—*T. E. Sherwood, and Andrews.*]

THWAITES, Gent., One &c. v. MACKERSON and Another. July 10th.

ASSUMPSIT for an attorney's bill, in bringing an action at the suit of the defendants against the Sheriff of Surry. There was also another bill for a further demand for other business. Plea—General Issue.

It was proved that the business was done, and that the bill for the business respecting the action had been duly delivered under the statute; but the second bill for the other business had not been so delivered.

With respect to the first bill, it appeared, on the part of the defendants, that after their sister had married a person named Powell, an execution against Powell came into the defendants' house, under which certain goods were taken; and it also appeared, that the plaintiff undertook to bring an action against the Sheriff for such taking, at his own risk, and charge the defendants no more than the money out of pocket: which had been paid him.

For the plaintiff it was shewn, that the defendants had represented to him that the goods in question had been secured by a settlement, at the time of the marriage of the

If an attorney undertake to conduct a cause for the costs out of pocket, it being represented to him by his client, that such client took a certain interest under a deed:—The attorney cannot charge more than the costs out of pocket, though it should turn out that the cause was lost, because his client did not take the interest under the deed which he stated that he took, it being the duty of the attorney to see the deed before he brought the action.

If an attorney, does business for a client of a

nature to make his bill taxable, and other business clearly not so, he is bound to put the whole into one bill, which bill is taxable; and he cannot bring an action in the first instance, and recover for the non-taxable business, but must deliver his whole bill a month &c. under the statute.

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 THWAITES
 v.
 MACKERSON.

defendants' sister, but on the trial of the action against the Sheriff, that settlement turned out not to be good; and it was contended, that the plaintiff was by this released from his engagement. It was however proved, on the cross-examination, that the plaintiff was told where the deed of settlement was. As to the second bill, it was contended, that the defence did not at all apply to that.

Lord TENTERDEN, C. J.—I am of opinion, that as the plaintiff knew where this deed was, it was his duty to see it before he brought an action, and not to trust to his client's representation as to the legal effect of a deed. As to the second bill, it is true, that it contains no taxable item; but if an attorney has a demand which is taxable, and another which is not, he must put both of them into one bill, and the whole of such bill may then be taxed. He cannot divide his demand into parts: that has been decided over and over again.

Verdict for the defendants.

Gurney, and Busby, for the plaintiff.

J. Williams, and Patteson, for the defendants.

[Attornies—*Thwaites, and Poole & G.*]

July 12th.

LEATHERDALE v. SWEEPSTONE.

If a party say to his creditor, that he will pay him so much, and put his hand in his pocket to

take out the money, but before he can get his money out, the creditor leaves the room, and the money is in consequence not produced till he is gone, this is no tender. A plea of tender is, in practice, very seldom successful; and the Lord Chief Justice, observed, that he was, on that account, always sorry to see such a plea on the record.

WORK and labour. Pleas—General Issue and a tender as to part of the plaintiff's demand. Replication denying the tender.

To prove the tender, a witness was called, who stated that he heard the defendant offer to pay the plaintiff the amount of his demand, deducting 14s. 0 $\frac{3}{4}$ d., which balance was the sum stated in the plea. That the defendant then put his hand into his pocket, but before he could take out the money, the plaintiff left the room, and the money was therefore not produced till the plaintiff had gone.

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LORD TENTERDEN, C. J.—This is no tender, the plaintiff got away before any tender could be made. I am always sorry to see a plea of tender on the record, because I know, from experience, that it is so very seldom made out.

Verdict for the plaintiff.

Sir *J. Scarlett*, and *Thesiger*, for the plaintiff.

Gurney, and *C. Cresswell*, for the defendant.

[Attornies—*D. Willoughby*, and *A. Michell*.]

1828.

*Further Adjourned Sittings in London, after
Trinity Term, 1828.*

BEFORE LORD TENTERDEN, C. J.

Oct. 16th. WHITEHOUSE, Assignee of HOLLAND, a Bankrupt, v. ATKINSON, Esq.

In trover by the assignees of a bankrupt, for goods taken by the sheriff under an execution, it appeared that the goods were taken at about the time of year at which the sheriffs are changed; and it was proved, that a witness, after the present cause was set down for trial, saw a form of return indorsed on the writ, which had never been returned. This form of return was signed by the defendant as sheriff:—Held, to be sufficient evidence that he was the sheriff who executed the writ; and that if the writ, when produced at the trial, has his name erased, and the name of the previous sheriff substituted, it will be a question for the Jury, whether that substitution was made to correct a mistake, or to defeat the plaintiff.

TROVER.—The goods in question consisted of the stock and furniture of the bankrupt, who kept a public-house in Staffordshire, and these goods were claimed by the plaintiff, as assignee under the bankruptcy. The defendant was the Sheriff of Staffordshire, and the goods had been seized under an execution, at the suit of a judgment creditor named Williams.

The bankruptcy was clearly made out, and there was no doubt that the assignees were entitled to the goods; and the main question was, whether the action should have been brought against Mr. Atkinson the present Sheriff, or against Mr. Meynell, the late Sheriff. To connect Mr. Atkinson with the taking of the goods, the writ, which had not been returned, was produced; and a witness proved, that when he saw it in the month of July, 1828, in the hands of the agent of the attorney for the execution creditor, (this cause being then set down for trial), there was indorsed on it a memorandum of the time when it was delivered at the Sheriff's office, and a form of a return, importing that 467*l.* 8*s.* 8*d.* had been levied; to the latter of which the name of Mr. Atkinson was put as Sheriff; but to the for-

The price at which goods are sold at a sheriff's sale is not necessarily the measure of damages in trover, if the sale be wrongful; but when the plaintiff is an assignee, as he must have sold the goods if they had come to him, Juries are often induced to find a verdict for no more than the sum at which the Sheriff actually sold.

In an action against the Sheriff, the officer who had given him security is not a competent witness for the defence, even though the officer is indemnified by the execution creditor, and does not employ the attorney.

mer there was the name of Mr. Meynell. However, on the writ being produced at the trial, it appeared that the name of Mr. Atkinson had been erased from the back of it, and the name of Mr. Meynell substituted, but by whom this had been done, or when, did not appear. It was distinctly shewn, that the writ went into the Sheriff's office, on the 1st of February, which is the time about which the Sheriffs are changed; and it was also shewn, that the goods were sold on the 28th and 29th of February; and that on the 1st March, 1828, the same person acted as under-sheriff both to Mr. Meynell and Mr. Atkinson. There was no evidence of the exact time at which Mr. Atkinson came into office.

On these facts, it was contended, that the name of Mr. Atkinson had been put on the writ by the mistake of a clerk, and that that mistake was corrected by the insertion of the name of Mr. Meynell instead of that of Mr. Atkinson, as it properly might be, the Sheriff not having been ruled to return the writ. The defendant's counsel also contended, that as the goods were fairly sold, the plaintiff, if entitled to a verdict, ought not to recover more than the goods fetched at the Sheriff's sale, which, after the proper deductions, was 389%. more especially as no notice of the bankruptcy was served till after the sale had commenced.

To prove the fairness of the sale, the Sheriff's officer who made the levy was called: he said, on the *voir dire*, that he gave security to the Sheriff; but he stated, that he was indemnified by the execution creditor, and was not to pay the attorney in this action.

LORD TENTERDEN, C. J.—I think he is not a competent witness; if the result of this action is against the Sheriff, he is liable at a certainty, and he never may get repaid on his indemnity; therefore it is his interest to defeat the action.

The plaintiff's counsel, in reply, relied much on the ab-

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sence of proof as to the exact time of Mr. Atkinson's coming into office, and contended, that the prices received for goods at the Sheriff's sale were not to be taken as the fair measure of damages in an action of trover.

Lord TENTERDEN, C. J. (in summing up) —The first question to be considered in this case is, whether this action is properly brought against Mr. Atkinson, the present Sheriff, and if you think that he is the Sheriff who sold these goods, the plaintiff has a right to recover, because the bankruptcy is clearly proved, in such a way as to shew that these goods became the property of the plaintiff, as assignee. From the evidence it appears, that the writ of *fiery facias* was delivered at the Sheriff's office, on the 1st of February, 1828. This is about the time of year, at which the Sheriffs are changed; but we have not had Mr. Atkinson's patent produced, nor indeed any evidence of the exact time at which Mr. Atkinson actually came into office. However, in the month of July, the writ is seen by one of the witnesses, with a form of return on the back of it, to which Mr. Atkinson's name appears as Sheriff. Now, at that time this cause was set down for trial, and if it had been tried then, and this writ produced with Mr. Atkinson's name to this form of return on the back, that would have been decisive against him; however, since that time, the name of Atkinson has been erased, and that of Meynell inserted. Now, if you think that the name of Atkinson put to this return was written there by mistake, and that some clerk in the Sheriff's office wrote the name of Mr. Atkinson, when he should have written the name of Mr. Meynell, and that, in fact, Mr. Atkinson had nothing to do with this execution, the defendant is entitled to your verdict; but if you should be of opinion that the insertion of the name of Meynell was an afterthought, to turn the plaintiff round, then the plaintiff is entitled to recover. With respect to the damages, a plaintiff is not bound by the sum at which goods have been

sold at an auction; but where the plaintiff is an assignee, who must have sold the goods if they had come to his hands before any sale by the Sheriff, it often happens, that a Jury considers the sum at which the goods were actually sold at auction, as a fair measure of damages. As to the notice, it should be observed, that it was not given early enough to be of any use in putting the parties on their guard, as the auctioneer did not receive it till after the sale had actually commenced.

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Verdict for the plaintiff. Damages—389*l*.
 being the amount at which the goods
 were actually sold by the Sheriff.

Sir *J. Scarlett*, and *Comyn*, for the plaintiff.

Campbell, and *Patteson*, for the defendant.

[Attornies—*Whitehouse & J.*, and *Alexander & Son.*]

KING, Gent. One &c. *v.* MASTERS.

Oct. 17*th*.

ASSUMPSIT on a promissory note, for 87*l*. 4*s.*, made by the defendant, and payable to the plaintiff; there was also a count for business done by the plaintiff as an attorney, and the money counts. Plea—General Issue.

This cause was undefended. The plaintiff's bill for business done, amounted to upwards of 300*l*., but there was no evidence as to what was the consideration for this note; however, by a reference to the bill for the business done, it appeared that, at the time of the date of the note, the amount for business done was only about 17*l*.

If an action be brought on a note, and for business done as an attorney, the note not tallying in its amount with the business done at the date of it, and no evidence being given as to the consideration for it:—It will be left to the Jury to say whether the note was given in satisfaction

of the bill for business done up to the time of its date, or whether it was an entirely distinct transaction.

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Lord TENTERDEN, C. J.—There is great difficulty here. How can I say that this note was not given in satisfaction of the bill, up to the date of it?

Sir *J. Scarlett*.—I submit that it is a question for the Jury. The sum for which the note is given does not at all correspond with the amount of the business done up to that time.

Lord TENTERDEN, C. J.—The question for the Jury is this, whether this note is to be considered as a discharge of the bill of fees up to that time? I own, that I think that the note is an independent transaction, because, that is for 87*l.* 4*s.*, and the bill up to that time amounts to a much smaller sum. Again, it is very unusual for people to pay their bills to attornies till they are regularly made out; and besides, as this plaintiff has delivered his bill a month before action brought, as he was bound to do, it was in the power of the defendant to have had it taxed; and if it had appeared to the master that this note had been given for the fees, he would have deducted that amount from the bill. It is for the Jury to consider whether the note is for any part of the same demand, or whether it is a distinct transaction.

Verdict for the plaintiff. Damages—39*l.*
being the amount of the note, and the
full amount of the bill of fees.

Sir *J. Scarlett*, and *Hutchinson*, for the plaintiff.

[Attornies—*W. H. King*, and *Downes*.]

1828.

OWEN v. ORD.

Oct. 18th.

ASSUMPSIT on an attorney's bill. It was proved that the business was done, but no very distinct evidence was given of any retainer; and two witnesses were called for the defendant, who stated, that, before the business was done, the defendant said that the plaintiff should be at no expense.

Though it is not absolutely necessary, yet in correct practice, an attorney ought, before he commences an action, to take a written direction from his client for so doing.

Verdict for the defendant.

Lord TENTERDEN, C. J.—I think it right to state, that every respectable attorney ought, before he brings an action, to take a written direction from his client for commencing it; and he ought to do this both for his own sake and for the sake of his client. It is much better for him, because it gets rid of all difficulty about proving his retainer; and it would also be better for a great many clients, as it would put them on their guard, and prevent them from being drawn into law-suits without their own express direction.

Gurney, and *Follett*, for the plaintiff.

Platt, for the defendant.

[Attornies—*Bennett*, and *In Person*.]

ARCHARD v. HONOR.

Oct. 20th.

ASSUMPSIT.—The first count of the declaration stated, that, in consideration that the plaintiff had agreed that he and his wife would become the servants of the defendant

If the contract between master and servant be the usual one for a year, determinable at a

month, the servant, if turned away improperly, cannot recover on a count stating the contract to be for an entire year; and he cannot, on the common count for wages, recover for any further period than that during which he had served.

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at certain wages; the defendant undertook, &c., to continue them in such service until the expiration of *one year*. Breach, that he discharged them without warning, before the year had expired. There was also a count for wages, and the money-counts. Pleas, *non assumpsit* to the special counts, and *non assumpsit* to the other counts, as to all but the sum of 11*l.*, and a tender of that sum. Replication, admitting the tender.

The plaintiff claimed wages for the time that he had served, and for a quarter more. It appeared, that the plaintiff and his wife entered the service of the defendant in the month of December, 1827, and were dismissed on the 6th of Feb. 1828; but the only evidence of the contract was, a conversation between the plaintiff and the defendant, at the time of the dismissal. In this conversation, the defendant told him, he must leave his house, and he offered him 16*l.* 4*s.* 10½*d.*, which was the amount of wages up to the time, and a month's wages more. This the plaintiff refused, and said he would not take less than a quarter's wages more; upon which the defendant said, he would not give it, as it was quite an unusual thing.

LORD TENTERDEN, C. J.—There is no evidence of the contract here declared upon. The most that can be made of this conversation is, that there was a contract for a year determinable at a month's notice. The declaration is on a contract for a year absolutely.

Gurney, for the plaintiff.—They have not even paid the month's wages into Court, the sum of 11*l.* is only for the time of the actual service.

LORD TENTERDEN, C. J.—You have no count upon a contract determinable at a month.

Curwood.—Does not your Lordship think we can recover it on the count for wages?

Lord TENTERDEN, C. J.—No. On that count you cannot recover for any more than the time you have actually served (a). The plaintiff must be called. The ordinary contract with servants is for a year, determinable at a month; but to entitle you to recover, you must declare properly upon that contract (b), and not declare as if your contract was for a year absolute (c).

Nonsuit (d).

Gurney, and *Curwood*, for the plaintiff.

Brougham, and *Fish*, for the defendant.

[Attornies—*S. Sharp*, and *Clift & F.*]

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(a) In the case of *Hull v. Heightman*, 2 East, 145, where a seaman had contracted to go a voyage from Altona to London, and back, and had stipulated that he should not be entitled to wages, till the end of the voyage, it was held that he could not maintain a general *indebitatus assumpsit* for his wages, *pro rata*, as far as London, though he was there wrongfully dismissed by his captain, but that his remedy was either for the breach of the special contract, or for such tortious act of the captain, whereby he was prevented from earning his wages.

(b) A form of declaring on that

contract will be found in 3 Ch. Pl. 154.

(c) It should be observed, that the recent stat. 9 Geo. 4, c. 15, which empowers the Judge at the trial to cause the record to be amended in cases where there is a variance, only extends to variances between any matter *in writing* or *in print* produced in evidence, and the recital or setting forth thereof upon the record, and not to cases where the proof is by parol.

(d) See the cases of *Hutman v. Boulnois*, *ante*, Vol. 2, p. 510; and *Beeston v. Collyer*, Id. 607, and the cases there cited.

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CAPEL and Another v. THORNTON.

An agent authorized to sell goods has (in the absence of advice to the contrary) an implied authority to receive the proceeds of such sale.

GOODS sold. Plea—General Issue. On the part of the plaintiffs, who were coal merchants, it appeared, that coals were delivered by their servant at the house of the defendant in Regent's Park, with a vendor's ticket in the name of the plaintiffs. No evidence was given of any order, but the vendor's ticket was proved to have been delivered to the defendant's footman; however, there was no proof that it ever reached the defendant.

On the part of the defendant it was proved, that the defendant's son had, for several years, bought coals of a person named Ellsworth, who professed to sell on his own account, but who, unknown to the defendant and her son, really sold on commission. It further appeared, that the defendant's son always received bills of parcels in the name of Ellsworth, and paid him for coals, Ellsworth giving receipts in his own name; and that being asked by her son to deal with Ellsworth, the defendant ordered these coals of him, and received a bill of parcels in his name; and in about a week after the coals were delivered, she paid him for them; however, more than a month after this payment, the plaintiffs sent the defendant a notice "to pay the amount to them or to their clerk, and not to Mr. Ellsworth."

Lord TENTERDEN, C. J.—The plaintiffs must be called. There is no evidence that the defendant ever gave any order to the plaintiffs; indeed it is proved, that the defendant only dealt with Ellsworth, who is admitted by the notice to be the agent of the plaintiffs; and if he, as their agent, had authority to sell goods, so had he (in the absence of advice to the contrary), an implied authority to receive the proceeds of such sale. The plaintiffs cannot avow the acts of their agent as to one part of the transaction, and repudiate them as to another part. With re-

spect to the notice, as the money was paid before the notice came to the defendant's hand, that cannot operate in the plaintiffs' favour.

Nonsuit.

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Gurney, and *Chitty*, for the plaintiffs.

Sir *J. Scarlett*, and *Comyn*, for the defendant.

[Attornies—*Meymott & Son*, and *Grimaldi & Stables*.]

See the cases of *Gillman v. Robinson*, *ante*, Vol. 1, p. 642, and *Pratt v. Willey*, *ante*, Vol. 2, p. 350.

VON LINDENAU v. DESBOROUGH.

Oct. 21st.

ASSUMPSIT on a policy of insurance dated June 16th, 1824, renewable for five years, on the life of Duke Frederick the Fourth of Saxe Gotha. There was also a count for money had and received. Plea—General Issue.

The defendant was the secretary of the Atlas Insurance Company, and the plaintiff had effected this insurance, which was for 3,200*l.*, as the director of the government country bank of the duchy of Altenburgh.

To shew an interest, it was proved, that Augustus Duke of Saxe Gotha, who was the immediate predecessor of Duke Frederick the Fourth, was, at his decease, indebted in his private capacity to various persons, to the amount of about 80,000*l.*, this bank being creditors to a large amount; and that Duke Frederick the Fourth, soon after his accession, entered into a treaty with the private creditors of Duke Augustus, by which he agreed to pay them their debts, by half yearly instalments, so that the

If A., being indebted to B., die, and C. agree to pay the debt by instalments, in five years, A. has an insurable interest in the life of C. for those five years.

If the assured, at the time of effecting the policy, conceals anything which is material for the insurer to know, the policy is void; and it makes no difference whether the assured considered it material or not: and what amounts to a misrepresentation, or to a material concealment, is a question for the Jury.

The fact, that, on a life policy, an unusually high premium was paid, is quite immaterial, and is therefore not to be taken as proof that the office considered the party to be a bad life.

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whole would be discharged in five years. This treaty was signed by the plaintiff on behalf of the bank.

Sir *J. Scarlett*, objected, that the plaintiff had no interest to enable him to effect this insurance.

Lord TENTERDEN, C. J.—It appears that this bank were creditors of the former Duke Augustus, to a large amount, and that Duke Frederick, having undertaken to pay the debts by instalments, in five years, the plaintiff, as the director of the bank, effects an insurance on Duke Frederick's life for those five years. Such being the facts, I think that the plaintiff has an insurable interest.

With regard to the Duke's state of health, it appeared, that the representation made before the policy was effected, stated, that his highness had never had gout, asthma, apoplexy, epilepsy, &c., and was not afflicted with any disorder tending to shorten life.

The certificates of his two physicians, which were given in before the execution of the policy, stated, that, since the year 1809, his highness had had a cataract in the left eye, and since the year 1819, had been "*hindered*" in his speech, from having had an inflammation of the chest, of which he had been perfectly cured; and they further stated, that he was free from disease and symptoms of disease; and it also appeared, that before the policy was effected, a letter from a person named Bernardi, an agent of the Union Insurance Office, at which a policy had also been effected, had been shewn to the defendant. This letter contained a passage to this effect: "agreeable to our information, the Duke has led a dissolute life, to the loss, according to some information, of his mental faculties; but this is contradicted by the physicians." However, by the evidence of the witnesses at the trial, it appeared, that the Duke was afflicted with almost a total loss of speech, from the year 1822, to the time of his death, which one of the medical witnesses attributed to local paralysis; that he had

periodical catarrhal affections, accompanied by fever, and also that his mind was diseased to a degree almost amounting to imbecility. It also appeared, that the immediate cause of his highness's death was an extravasation of water on the brain, produced by inflammation; but on the head being opened after death, a tumour more than six inches in length, two in breadth, and one in depth, was found inside the skull, and this had not only pressed upon the brain, but had also depressed the skull at the base; from which it was inferred by the medical witnesses, that this tumour had formed either before birth, or in very early infancy.

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Sir *J. Scarlett*, for the defendant.—I submit that the plaintiff must be nonsuited. Here was a concealment of material facts. At the time of the effecting of the policy, there is not the slightest allusion to the state of the Duke's mind, nor to the periodical catarrhal affection. These were matters most material to be communicated to the Insurance Office.

Lord TENTERDEN, C. J.—It strikes me that these points are what I cannot decide. I shall tell the Jury, that if any material fact was either concealed or misrepresented, the policy is void; and it will be for them to say, whether these omissions are material concealments.

Sir *J. Scarlett*.—I admit they are matters of fact.

Lord TENTERDEN, C. J.—There is also a warranty that the Duke was not afflicted with any disease tending to shorten life; but that is rather a question of fact for the Jury.

A witness stated, that the premium paid on this insurance, was about two-thirds higher than the ordinary premium on a life of the same age. This evidence was given,

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with a view of shewing that the Duke was not considered by the office as a good life.

Lord TENTERDEN, C. J.—The amount of the premium is quite immaterial. That has been held in cases of ship policies as long as I have known Guildhall.

Mr. Green, an eminent surgeon, was called, to state his opinion that the symptoms of the Duke were not attributable to organic injury; but, in his cross-examination, he stated, that if he had been referred to before the policy was effected, he should have felt it his duty to have mentioned the Duke's state of mind, and the periodical catarrhal affection.

Lord TENTERDEN, C. J.—I shall tell the Jury, that, if any fact, in their opinion material for the information of the office respecting the state of the Duke's health, and which was known to the party certifying, was concealed, then, in my opinion, the policy is void.

Brougham, for the plaintiff, elected to be nonsuited.

Nonsuit.

Brougham, *F. Pollock*, and *Brodrick*, for the plaintiff.

Sir J. Scarlett, *Campbell*, and *Coleridge*, for the defendant.

[Attornices—*Blacker & G.*, and *Bovill*.]

IN the ensuing Term, *Brougham* moved to set aside the nonsuit, and for a new trial, on the ground, that the question to be left to the Jury was not, as his Lordship had put it at the trial, whether any material fact was concealed; but whether there was a concealment of any fact

which was really material, and which the assured himself considered to be material. And he also contended that, even admitting that there had been a concealment by the assured, still the letter of Bernardi was sufficient to put the office upon making inquiries, if they had thought their information not sufficient: and he argued, that life policies could not be effected, if the assured must run the risk of being bound to state every thing, that, upon the opinions of physicians, might be afterwards considered to be material.

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Lord TENTERDEN, C. J.—The letter of Bernardi was not a communication from the assured, but a letter from the agent of another office; however, if that had expressly disclosed the facts material to be known, it might have been a question whether it was material to tell the office that which they in effect knew before; but this letter contains no direct information, it is all rumour and report. Among the questions put by the office to the physicians, I find this, "Are there any other circumstances within your knowledge which the directors ought to be acquainted with?" Now this question calls for a statement of every thing that any one could think material. Some of the witnesses, using a soft expression, said, that the Duke's intellect was "controlled"; but the effect of the evidence is, that his mind was very much impaired; and one of the witnesses, who had been with him for years, never heard him utter a syllable. Ought not these circumstances to have been known? Upon the whole of the facts, I am of opinion, that I was not wrong in the way in which I proposed to leave this case to the Jury.

BAYLEY, J.—Whether a policy be effected on a life, or a ship, or against fire, the underwriter has a right to expect that every thing material should be communicated to him. And if a circumstance be not communicated, the question is, whether it was *in fact* material; and not, whether

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the assured *believed* that it was material: and the communication of all such facts is an onus lying on the assured. My Lord *Tenterden*, at the trial, offered to leave the materiality to the Jury; and the mode in which his Lordship proposed to put the question appears to me to be right in every respect.

LITTLEDALE, J.—It does not signify whether the assured thought a certain fact material to be communicated to the underwriter. The question is, whether, in point of fact, it was material; and that is a question for the Jury.

Rule refused (a).

(a) In the course of the discussion, the following cases were cited: *Mayne v. Walter*, Park. Ins. 531; *Ross v. Bradshaw*, Id. 649; *Cortier v. Boehm*, 3 Burr. 1905; *Haywood v. Rodgers*, 4 East, 590; *Huguenin v. Rayley*, 6 Taunt.

186; *Bufe v. Turner*, Id. 338; *Morrison v. Muspratt*, 4 Bing. 60. See also Park. Ins. 294—306; Id. 317—319; Id. 649—651; and *Maynard v. Rhode*, ante, Vol. 1, p. 360.

Oct. 22nd.

The EAST INDIA Company v. LEWIS.

In an action for money had and received, the defendant, as an answer to the action, put in one part of a deed of covenant, executed by the plaintiffs, whereby the defendant covenanted to pay over all monies received by him on account of the plaintiffs; notice having been given to the plaintiffs to produce the counterpart of this deed:—Held, that the defendant's having possession of the plaintiffs' part of the deed, was presumptive evidence that he had executed the counterpart, and that this was equally a ground of nonsuit whether the counterpart had been lost or not.

MONEY had and received (a). Plea—General Issue. It appeared that, previous to the year 1818, the defendant had been the sub-treasurer at Bencoolen; and that, as such, he had had the charge of the East India Company's treasure at that place; and that before he left that situa-

(a) There were several special counts in the declaration, but as the Solicitor-General opened this

as a case of money had and received, it is unnecessary to state them.

tion, which was on the 27th of March, 1818, he was directed to deliver an account of the treasure, which ought to be kept closely guarded in certain rooms in a fort there, the defendant having the custody of the keys of those rooms. It further appeared that the defendant did deliver such account in the month of April; and that, on the treasure being counted in the month of July, 1818, a deficit was discovered; and it was ascertained that the sum of 146,700 dollars (between 35,000*l.* and 36,000*l.*) was wanting of the sum that should have been found there, according to the account delivered by the defendant. And it was stated by the defendant's successor in the office of sub-treasurer, that he had never taken money from the fort, as he had paid the current expenses of his office from monies paid into his office, which had not been carried into the fort; and he also stated, that he believed that no one could have taken away any money between the months of April and July, 1818.

Gurney, for the defendant, proposed to shew, that the defendant was under a covenant to perform his duty properly, in his office of sub-treasurer, and that therefore the present action of *assumpsit* would not lie. For this purpose, he put in a deed of covenant, purporting to be between the Company on the one part, and the defendant on the other. This deed, which was dated in February, 1816, recited, that the defendant had been appointed sub-treasurer, and by it the defendant covenanted to account faithfully for all monies, and pay over &c. This deed was under the common seal of the Company, and notice had been given to the Company's attorney to produce the counterpart executed by the defendant.

In answer to this, *Tindal*, S. G., for the plaintiffs, proposed to shew that the defendant had obtained possession

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of this part of the deed, which was executed by the Company, without his having himself executed the counterpart. And with a view of shewing this, it was proved, by a witness named Owen, that it was his duty to keep the counterparts of deeds of covenant executed by the East India Company's covenanted servants, and that he could not find any counterpart of this deed executed by the defendant. This witness also stated, that the practice, when the party was abroad, was, for the Company to execute their part, and to send that, together with the unexecuted counterpart, to the governor of the place where the party was; and for the governor, on getting the counterpart executed, to deliver over the Company's deed to such party; and that upon this it was the duty of the governor to return the counterpart to the East India House. And the further to raise an inference that the defendant had obtained possession of the Company's part of the deed without executing the counterpart, it was proved that the defendant acted for a short time as secretary to the government at Bencoolen; however, it was admitted that the secretary would not have to open letters sent by the Court of Directors to the governor.

Lord TENTERDEN, C. J.—I am of opinion, that the plaintiffs have not shewn enough to rebut the presumption that the defendant has executed the counterpart of this deed. It was clearly the duty of some person to keep possession of this deed till the counterpart was executed; and this deed being in the possession of the defendant, is presumptive evidence that he has executed the counterpart. If he has executed it, and it is lost, it is still his deed, and the plaintiffs must sue upon it, and cannot maintain an action against him for money had and received. I think the plaintiff must be called.

Sir J. Scarlett.—I fear that this evidence would hardly be sufficient proof of the loss of the counterpart.

Lord TENTERDEN, C. J.—On this evidence, I must take it, that the counterpart was executed by the defendant; and if it was, the question, whether it is lost or not, is quite immaterial in this action.

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Nonsuit (*b*).

Tindal, S. G., *Bosanquet*, Serjt., Sir *J. Scarlett*, *Spankie*, Serjt., and *Dodd*, for the plaintiffs.

Gurney, *Brougham*, and *Chitty*, for the defendant.

[Attornies—*E. & J. Lawford*, and *M. Heath*.]

(*b*) *Assumpsit* only lies on agreements not under seal, an action of debt or covenant being the proper remedy for the non-performance of agreements by specialty. In the case of *Schack v. Anthony*, 1 M. & S. 573, where a charter-party under seal contained a covenant to pay freight to the master, it was held that the master must sue in debt or covenant, and that the owners could not maintain *assumpsit*; and Lord *Ellenborough* observed, "that if a bond were given to a trustee, it could hardly be contended, that an action of *assumpsit* could be maintained by the *cestui que trust* for the recovery of the money secured by the bond. However, in

the case of *Sutherland v. Lishnan*, 3 Esp. 42, it was held, that if the deed is only executed by the plaintiff, and not by the defendant, *assumpsit* is the proper form of action. So, in the case of *Foster v. Allanson*, 2 T. R. 479, where a partnership by articles under seal had been dissolved, and a balance struck, and there had been a promise to pay that balance, it was held that an action of *assumpsit* would lie. And in *Moravia v. Levy*, Id. 483, *Buller*, J., held, that it would lie on an express promise to pay a balance struck, though articles under seal, containing a covenant to account, were still subsisting.

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Oct. 23d. **RALPHO and Others, Assignees of RUTLEGE, a Bankrupt, v. DAWES and Another.**

If assignees of a bankrupt, suing for a debt due before the bankruptcy, receive notice of disputing the trading, &c. the Judge will only grant them a certificate for the costs of producing the depositions, and not for the costs of the attorney's attendance, or of witnesses to prove the bankruptcy.

ASSUMPSIT on a bill of exchange, drawn by the bankrupt on the defendants, and accepted by them. Notice of disputing the trading, petitioning creditor's debt, and act of bankruptcy had been given; but, as this bill became due before the bankruptcy, the depositions taken before the commissioners were read, to prove the trading, petitioning creditor's debt, and act of bankruptcy (a).

The defendants proved that the bankrupt had received a greater sum on their account than the amount of this bill: and the plaintiffs were

Nonsuited.

Gurney, for the plaintiffs, applied for a certificate to enable them to deduct the costs of proving the bankruptcy from the defendants' costs (b); and he asked to be allowed the expenses of three witnesses, who had been subpoenaed to establish the bankruptcy, and also the expense of the attorney's attendance.

LORD TENTERDEN, C. J.—If there had been no notice, the commission and adjudication would have been sufficient proof of the bankruptcy; but as there was a notice, and the bankrupt could have brought the action, you were obliged to produce the depositions, which are made conclusive evidence. All I can give you is your costs of producing the depositions, which amount to nothing.

No certificate was granted.

(a) As to those points these depositions are, by sect. 92 of the bankrupt act, 6 Geo. 4, c. 16, made "conclusive evidence of the matters therein respectively contained, in all actions at law and suits in equity brought by the assignees,

for any debt or demand for which the bankrupt might have sustained any action or suit."

(b) Under sect. 90 of the bankrupt act, 6 Geo. 4, c. 16. See Arch. B. L. lv.

Gurney and Hutchinson, for the plaintiffs.

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Sir *J. Scarlett*, *F. Pollock*, and *Kelly* for the defendants.

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[Attornies—*Tate*, and *Fisher*,—*Green & A.*]

PEYTON v. The GOVERNORS of ST. THOMAS'S HOSPITAL.

Oct. 23d.

CASE.—The declaration stated that the defendants, being possessed of a house, pulled it down in so negligent a manner as to injure the house of the plaintiff. Plea—General Issue.

The house in question belonged to St. Thomas's Hospital; and it was proved that Mr. Robinson was the surveyor to that hospital, and that he had the management of all their buildings; and it was proposed to read a letter written by him to the plaintiff respecting the pulling down of this house.

Sir *J. Scarlett*.—I submit that this letter is not evidence. Mr. Robinson might be surveyor for many other parties besides the Governors of St. Thomas's Hospital.

Lord TENTERDEN, C. J.—As it appears that he was their surveyor, and had the management of their buildings, and also that this house belonged to the Governors, I must presume that this letter was written by him as their surveyor. This is a corporation, and they cannot do these acts for themselves.

In an action against a body corporate, for negligently pulling down a house which belonged to them, whereby the plaintiff's house was injured; a letter written to the plaintiff, respecting the pulling down of the house by the defendant's surveyor, who had the management of all their buildings, is to be presumed to have been written by him in that capacity, and is therefore evidence against them.

The letter was read. The plaintiff was ultimately

Nonsuited.

Tindal, S. G., *Gurney*, *Brodrick*, and *Dodd*, for the plaintiff.

Sir *J. Scarlett*, *Campbell*, and *C. Cresswell*, for the defendants.

[Attornies—*Smith & B.*, and *Wainwright & Co.*]

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IN the ensuing Term, *Tindal*, S. G., obtained a rule nisi for setting aside the nonsuit, on grounds quite distinct from the point above determined.

Oct. 24th.

WHITMORE and Another v. WILKS the Elder.

If trustees under a paving act sign checks drawn by the clerk of the person who is clerk to the trust, those checks being drawn so as to be alterable from small sums to larger, the trustees cannot charge the clerk to the trust for negligence if these are altered, as it was their duty not to sign checks drawn in such a form; nor can they charge him for misconduct of his clerk, which would have been prevented if the trustees had done their own duty in the way in which the clerk to the trust had fair reason to expect they would.

A count charging a clerk with negligence in suffering his employers to be

defrauded of sums of money, without specifying any in particular, is bad.

If, by a private act of Parliament, forty-eight trustees are appointed, (not being a corporation), of whom sixteen are to go out annually by rotation; and, by the same act, the trustees are to sue and be sued in the names of their treasurers for the time being; an action for money had and received may be maintained in the names of the present treasurers, although both they and the present trustees came into office since the time when the money was received by the defendant to the use of the trust.

ASSUMPSIT by the plaintiffs, as treasurers to the trustees for lighting, watching, and paving the parish of St. Luke, Middlesex. The first count of the declaration stated, that, in consideration that the trustees would appoint the defendant to be clerk to the said trustees, he undertook to perform his duty as clerk; that they did appoint him, and that it was his duty to prepare checks to be signed by the trustees, or any three of them, on one Thomas Cobb; that fifty checks were drawn by the defendant "in a careless, improper, and unbusiness-like manner;" and that the said checks were altered (after they had been signed) to larger sums, without the consent of the trustees; that they were presented to Messrs. Masterman, who, by reason of the careless, improper, and negligent manner in which the same were drawn, and not being able to detect the alterations, paid them. *Second* count, the like on an executed consideration. *Third*, that the defendant had been appointed clerk, and promised to perform his duty as such; and that checks were drawn and paid, and returned by the bankers; and that it was his duty to deliver them over to the trustees within a reasonable time; but that he did not do so. *Fourth*, for neglecting to give notice of the defaults of a collector (a).

(a) No evidence was offered on this count.

Fifth, that it was his duty to make out perfect accounts of payments made on behalf of the trustees; but that he did not. *Sixth*, that it was his duty to investigate the accounts, and to take care that no improper ones were allowed; but that he suffered improper payments to be made. *Seventh*, that he undertook to use reasonable diligence as clerk, and that he "permitted the trustees to be cheated and defrauded of divers sums of money." *Eighth*, money had and received. *Ninth*, account stated. Plea—General Issue.

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The case on the part of the plaintiffs was as follows:—By a private act of Parliament, 50 Geo. 3, c. cxlix, it was enacted, that there should be forty-eight trustees for the paving, lighting, and watching the parish of St. Luke, of whom sixteen should annually go out by rotation; and also two treasurers, with separate rates for the paving and the lighting of this parish; and also a clerk, to which latter office the defendant was appointed in the year 1810, he being also the vestry-clerk. The plaintiffs were appointed treasurers in 1827. In the year 1821 the defendant employed a confidential clerk, named Milne, to do the whole of the business necessary to be done by the clerk to the trustees. Milne absconded in the year 1826, having embezzled large sums of money belonging to the trustees, with which sums it was now sought to charge the defendant, under the following circumstances:—

It appeared, that the course of business was for all demands on the trustees to be audited by an audit committee, and if allowed by them, such allowance was reported to the next general meeting of trustees; and if, at that meeting, the demands were ordered to be paid, it became the duty of the clerk to make out a list of them, called the pay-list, and to draw checks for the amounts, which checks were to be signed by three or more trustees, at what was called a pay committee. It appeared, that Milne had introduced into the pay-lists several small sums as due to

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fictitious persons, which had never been allowed by the audit committee, and that he obtained checks for these sums; *e. g.* in May, 1824, Milne, before the sitting of a pay-committee, had inserted the name of Sabbaton in the pay-list, for a sum of 1*l.* 16*s.* 10*d.*; no such money was really due, and no such account had ever been audited. A check for this sum was, however, drawn by Milne, and signed by the trustees; but, when paid at the banker's, the sum had been altered to 9*l.* 16*s.* 10*d.* (a). The amount of checks so altered was 1165*l.* 3*s.* 4*d.*

Another sum, with which it was sought to charge the defendant, was a sum of 350*l.* Under the act of Parliament, the trustees have a power of letting the privilege of carrying away dust and ashes. This, in the year 1825, was let to a person named Sinnott, at the sum of 350*l.* *per* quarter. The first quarter was paid in advance to the defendant himself, at Midsummer, 1825; and, on the 8th of November, 1825, Mr. Sinnott, in consequence of a letter he received, came to the board-room of St. Luke's parish, and paid 350*l.* for the next quarter, to Milne, who gave a receipt, signed "For the trustees of St. Luke, Middlesex, Joseph Milne." After the third quarter became due, the defendant wrote to Mr. Sinnott for payment, saying nothing respecting the payment for the second quarter; and when the payment for the third quarter was made to the defendant himself, he did not object that the second quarter had not been paid.

Another sum with which it was sought to charge the defendant was a sum of 375*l.* By the act of Parliament, the two treasurers are to keep separate accounts; and one of them kept a banking account with Messrs. Masterman, the other with Messrs. Williams; and it ap-

(a) This had been done by making the words *one pound* the first words of a line, so that the word *ninety* could be inserted before them, and the letter *s* put in after the word *pound*.

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peared that Milne called on three of the trustees, separately, at their houses, and told them that a sum of 350*l.* had been paid in at Messrs. Masterman's, which was the wrong banking-house; and he, therefore, wished them to give him a check for the amount, with a view that he should take it away from Messrs. Masterman's and pay it in at Messrs. Williams's. They gave the check (which, by the act, ought to have been signed at a meeting), and Milne received the money at Messrs. Masterman's, but never paid it in at Messrs. Williams's.

It was also imputed to the defendant as negligence, that he did not cause the ledger and cash-book to be duly posted; and that he did not attend at any but the general meetings of the trustees.

Lord TENTERDEN, C. J.—It strikes me, that there are two objections to charging Mr. Wilks with these checks: He has a right to say that the trustees shall transact their business properly. Now, the trustees here draw checks for persons named in the pay-list, whose accounts were not in the audit-book; and it appears to me that the trustees should see that the sum put down in the pay-list is warranted by the audit-book. The other objection is, that the checks are altered from small sums to large. The exact mode is not proved, but I can easily suppose it; and if a check for a small sum was written in such a way as to be easily alterable to a larger sum, it was the duty of the trustees not to sign it; and Mr. Wilks had a right to expect that the trustees would do their duty before they could charge him.

Campbell, for the plaintiffs.—I submit that the defendant was guilty of negligence before any default in the trustees. It was his duty, as clerk, to make out a true pay-list; and if he did not do so, it clearly was a gross breach of duty. It is true, that he did not himself put items into

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the pay-list which were not in the audit-book, but still he employs another who does it, and for the acts of that other he must be answerable.

LORD TENTERDEN, C. J.—It is, no doubt, the duty of a clerk to make out a correct pay-list; and you do not impute it to the defendant that he himself has done otherwise. You seek to charge him with the wrongful act of another. Now that could not have happened at all, if the trustees had done their duty in that way, in which Mr. Wilks had fair reason to expect that they would.

To prove the payment of the 350*l.* by Mr. Sinnott to Milne, at the board-room, Mr. Sinnott was called.

Sir *J. Scarlett*.—He is not a competent witness; he is the person who had to pay the money. He is to say, that he paid it to Milne; and if that payment was not made under such circumstances as will clear him, he will have to pay the money over again. He has, therefore, a direct interest to make it a good payment, if he can.

LORD TENTERDEN, C. J.—As at present advised, I think him competent to prove the fact of a payment to Milne.

He was examined.

Evidence was given, that the books had not been posted.

LORD TENTERDEN, C. J.—The seventh count in this declaration charges generally, that he suffered the trustees to be defrauded without stating how. I think I am bound as a Judge not to receive evidence upon such a count as that; it does not give the party the least idea what it is that he has to defend himself against.

Sir *J. Scarlett* objected, that the plaintiffs must be non-suited, as they did not become treasurers till 1827, and all

the defaults were before that time; and he relied on sect. 158 of the act (*a*), which empowers the trustees to sue by their treasurers; and he further contended, that as some of the trustees had gone out by rotation, this was not money had and received to the use of the present trustees, they not being a body corporate.

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Lord TENTERDEN, C. J.—This is a point of the greatest importance. If I should hold, that money had and received must be maintained by those who are trustees at the time, a great many just claims of trustees would be lost. I cannot decide so important a point here.

Sir *J. Scarlett* addressed the Jury for the defendant, and contended, that the trustees could not charge the defendant with negligence, as they had been guilty of much greater negligence than he had.

Lord TENTERDEN, C. J. (in summing up).—This action has its origin in the very great malversation of a clerk of Mr. Wilks; however, there is not the slightest reason to suppose that Mr. Wilks himself ever knew any thing about it. This case is divided into several parts, and the first of them has relation to the preparing of the checks, which, from the way in which they were drawn, could be altered from small sums to larger. Now, I am of opinion, that, in point of law, the trustees cannot charge Mr. Wilks with the

(*a*) By the private act of Parliament, 50 Geo. 3, chap. *cxlix*, it is enacted, "That the trustees to be appointed under this act shall sue and be sued in the name or names of the treasurer or treasurers, clerk or clerks, for the time being, to be appointed under this act; and that no action or suit, which may be brought by or against the said trustees, or any of them, shall

abate or be discontinued by the death or removal of such treasurer or treasurers, clerk or clerks, or by the act of him or them without the consent of the said trustees, as the case may be; but the treasurer or treasurers, clerk or clerks for the time being, shall always be deemed plaintiff or plaintiffs, defendant or defendants, in every action or suit, as the case may be."

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amount of these alterations, because he had fair reason to suppose that the pay-committee would draw their checks in such a way as to prevent their being altered. Another part of the charge in the declaration is, a general neglect of duty. Now, I think that no man ought to be brought to answer a general charge of neglect of duty, without its being specified what the alleged negligence is; but it appears to me, that there is no negligence on the part of Mr. Wilks, that is not met by greater negligence on the part of the trustees. It is said, that he was guilty of negligence in not posting the ledger and cash-book. However, it is clear, that the trustees suffered that, for if they had ever thought it worth their while to look at the books, they would have seen that they were not properly posted. Again, it is said, that he did not attend all the meetings; but, to that the direct answer is, that the trustees did not require him to do so. The case, therefore, seems to be confined to the two sums which are sought to be recovered on the count for money had and received. *First*, as to the sum of 375*l.*, it appears that Milne went to three trustees, and told them that this sum had been paid into a wrong banking-house; upon which they separately signed a check, which allowed him to get possession of it. This they ought never to have done, for, by the act of Parliament, all checks are to be signed at a meeting; and besides, even if the money was at a wrong banking-house, no use could be made of it in any way but by the trustees, or under their authority. I will not say that I am surprised that they allowed themselves to be so deluded, because we see things of this kind every day; but then, how does this affect Mr. Wilks? It is true, that the money is received by his clerk, but still he is only answerable for the acts of his clerk within the scope of his duty; and I own, it strikes me, that the giving of this check was a misplaced confidence by the trustees, and no fault of Mr. Wilks.

His Lordship then, with respect to the sum of 350*l.*, received by Milne from Mr. Sinnott, left it to the Jury to say,

whether the defendant had reason to suppose that money would be paid to Milne at the board-room, directing them, if they thought he had, to find a verdict for the plaintiffs for that sum.

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Verdict for the plaintiffs. Damages—350*l*.

Campbell, F. Pollock, and Parke, for the plaintiffs.

Sir J. Scarlett, Gurney, Brougham, and Chitty, for the defendant.

[Attornies—*Simson*, and *Wilks Senr.*]

IN the ensuing Term, *Sir J. Scarlett* moved for leave to enter a nonsuit on the point reserved; and contended, that the action for money had and received was founded on a contract; and that neither the present trustees, nor the present treasurers for them, could maintain an action founded on a contract made with their predecessors; and he cited the cases of *Smith*, assignee of *Blake*, v. *Goddard*(*a*); *Jeffery* v. *MacTaggart* (*b*).

BAYLEY, J.—In whose names do you say that the action should have been brought?

Sir. J. Scarlett.—In the names of the persons who were either the treasurers or the trustees at the time when the money was received.

LORD TENTERDEN, C. J.—The objection that the treasurers cannot sue for money due before their time, and before the time when the present trustees came into office, involves a question of very grave and extensive importance, as the trustees acting under a great number of acts of Parliament would be materially affected by a decision against the present plaintiffs on that ground. However, I think that the effect of this statute, which authorizes the trea-

(*a*) 3 B. & P. 465.

(*b*) 6 M. & S. 126.

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surers for the time being to sue, is to give them power to sue in all cases for by-gone sums received to the use of the trustees, though before their time; and if we were to hold otherwise, many sums due to these trusts could never be recovered at all. These trustees are trustees for the parish, and the treasurers, though appointed by the trustees, are really the representatives of the parish.

BAYLEY and LITLEDALE, Js. concurred.

Sir *J. Scarlett* then applied for a new trial, on the ground, that Sinnott was not a competent witness; and that the sum of 350*l.* was not paid by Sinnott to Milne under such circumstances as to make the defendant liable.

The Court, on these grounds, granted a rule nisi for a new trial.



Oct. 25th.

PASCALL v. HORSLEY and Another.

If one of two defendants plead a plea of bankruptcy *pais darrein continuance*, the plaintiff cannot, at *Nisi Prius*, confess this plea to be true, and go on with the case as to the other defendant.

AS soon as this case was called on, *Wightman*, for the defendants, put in a special plea of the bankruptcy of one of the defendants, *pais darrein continuance*.

Campbell, for the plaintiff.—I wish to confess the plea, and to try the case as to the other defendant.

Lord TENTERDEN, C. J.—That cannot be done at *Nisi Prius*. I cannot deal with a plea *pais darrein continuance*. I must receive the plea, and cause it to be annexed to the record; but I cannot receive a replication, or even a confession of it. You must reply in the Court above.

Campbell, for the plaintiff.

Wightman, for the defendant.

[Attornies—Osbaldeston & M., and Davis & Co.,—Borradaile & Co.]

See the case of *Myers v. Taylor*, ante, Vol. 2, p. 306, and 1 Arch. Pr. 199.

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Adjourned Sittings at Westminster, after Trinity Term, 1828.

BEFORE LORD TENTERDEN, C. J.

REX *v.* HUGHES and Others.

Oct. 27th.

INDICTMENT for a riot, and for assaulting a person named Lewis.

The defence set up was, that two of the defendants were the bail of Lewis, in an action in the Palace Court, and that fearing that he would run away, they wished to take him into custody and secure him.

Bail to the sheriff have no right to take their principal into custody, nor have bail in the Palace Court. With respect to bail above, it is otherwise.

Lord TENTERDEN, C. J.—I am clearly of opinion, that bail to the Sheriff cannot take their principal as bail above may; and I consider the bail in the Palace Court to be in the same situation as bail to the Sheriff.

Verdict—Guilty.

Brodrick, for the prosecution.

Denman, C. S., and *Busby*, for the defendants.

[Attornies—*Horncastle*, and *Willis*.]

The cases on the subject of bail rendering their principal, and also respecting their taking him into custody for that purpose, will be found collected and referred to in 1 Arch. Pr. 311—315.

MORTIN *v.* SHOPPEE.

Oct. 27th.

ASSAULT. Plea—General issue. The plaintiff was walking along a foot-path by the road side at Hillingdon, and the defendant, who was on horseback, rode after him at a quick pace. The plaintiff ran away, and

Riding after a person and obliging him to run away into a garden to avoid being beaten, is an assault.

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got into his own garden; when the defendant rode up to the garden-gate, (the plaintiff then being in the garden about three yards from him), and shaking his whip, said, "Come out, and I will lick you before your own servants."

Denman, C. S., objected, that this did not amount to an assault.

Lord TENTERDEN, C. J.—If the defendant rode after the plaintiff, so as to compel him to run into his garden for shelter, to avoid being beaten, that is in law an assault.

Verdict for the plaintiff—Damages, 40s.

Brougham, and *Comyn*, for the plaintiff.

Denman, C. S., and *Law*, for the defendant.

[Attornies—*Poole & Co.*, and *Carter & Co.*]

Oct. 28th.

SHERRINGTON v. JERMYN.

One having made and signed a promissory note, handed it to a third person, the payee being present; but before it was given to the payee it was altered, by the consent of all parties:—Held, that this giving it to the third person was not an issuing of it, and that it did not require a new stamp.

ASSUMPSIT against the defendant as the maker of a promissory note, payable to the plaintiff, or order, one month after date. It appeared, from the evidence of Mr. Freeman, that he was present, with the plaintiff and the defendant, when the note was made. That the body of the note was written by the plaintiff, and signed by the defendant, and that, after signing it, the defendant handed it to the witness to attest, and to give it to the plaintiff; and that when it was so handed to Freeman, the note ran thus:

"I promise to pay to Mr. S. Sherrington, or order, on demand, the sum of Two Hundred Pounds, with interest."

But after it was so put into the hands of Freeman, and before it was given to the plaintiff, it was, with the consent of all parties, altered to its present form, which was this:

"One month after date, I promise to pay to Mr. S. Sherrington, or order, Two Hundred Pounds."

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The words "on demand" being struck out with a pen, and "one month after date" substituted, and the words "with interest" being altogether erased.

F. Pollock, for the defendant, submitted, that the note having been handed over to Freeman in the manner stated, after it had been signed and perfected by the defendant, it was to be considered as issued from that time, and that consequently it was void under the stamp laws.

Lord TENTERDEN, C. J.—I am of opinion, that, as it was all one transaction, it could not be considered as issued at the time of the alteration.

Verdict for the plaintiff.

Campbell and Gunning, for the plaintiff.

F. Pollock and Ashmore, for the defendants.

[Attornies—*Beart*, and *Baker*.]

See the cases of *Bishop v. Chambré*, ante, p. 55; *Sentance v. Pool*, ante, p. 1, and the authorities there cited.

In the case of *Walton v. Hastings*, 4 Camp. 223, it was held, that if a bill of exchange is delivered by the drawer to the payee, and the date is altered by an agreement between the payee and drawee before acceptance, the bill is made void. However, in the case of *Downes v. Richardson*,

5 B. & A. 674, it was held, that an accommodation bill having been altered, with the consent of the acceptor, before it came into the hands of a *bonâ fide* holder for value, was good as against the acceptor, though altered without the consent of the drawer and the first indorser, because an accommodation bill is not issued till it is in the hands of some person who is entitled to treat it as a security available in law.

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Oct. 29th.

KENNEDY v. GAD.

The Lord Chief Justice will not try an action for money had and received, to recover back a deposit paid to abide the event of a wrestling match, which did not take place.

MONEY had and received. Plea—General issue.

This case was undefended.

Hutchinson, for the plaintiff, opened, that a wrestling match was to have taken place at Brighton; and that the plaintiff deposited 24*l.* in the hands of the defendant, to abide the event of the match. The match did not take place; and the defendant being called upon to return the money, he paid back 16*l.*, but refused to pay the remaining 8*l.*; to recover which this action was brought.

Lord TENTERDEN, C. J. — This is an action for a sum of money deposited as a bet on a wrestling-match, which is an action I ought not to try; and I shall discharge the Jury from giving any verdict.

Jury discharged.

Hutchinson, for the plaintiff.

[Attornies—*Innis*, and *Humphreys*.]

See the case of *Egerton v. Furzeman*, ante, Vol. 1, p. 613.

Oct. 29th.

BANN v. DALZELL, Esq.

In an action on an Irish judgment, the question, whether any and what interest is recoverable, is a

DEBT on an Irish judgment, obtained by the plaintiff, and one Bond, his partner, (whom the plaintiff survived) for the sum of 81*l.* The defendant paid 81*l.* into Court;

question for the Jury, under all the circumstances of the case. And in deciding this question they will have to consider whether the plaintiff has taken proper steps to find his debtor and follow up his judgment by an execution, or whether he has been guilty of *laches*.

and the only question was, whether or not the plaintiff was entitled to interest on the judgment debt, it being admitted that the original debt, for which the judgment was obtained, would not have carried interest. The judgment was recovered in the Court of Exchequer in Ireland in 1817.

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F. Pollock, for the the plaintiff, contended, that if he could shew that the plaintiff had used due diligence, after obtaining the judgment, in order to find the defendant and render his judgment available, he was entitled to such interest as the Jury should deem reasonable, leaving it to them to say what amount of interest they would award him. It was very hard, in a case where every means had been taken to make this judgment available, that the plaintiff should be told, ten years after it was obtained, that he was to receive only the amount of the sum recovered by his judgment.

Evidence was then given, with a view of shewing that the plaintiff had used due diligence to put his judgment in execution, he having, shortly after judgment was signed, issued a writ into Yorkshire upon it, after he had made inquiries for the defendant in Town.

R. V. Richards, for the defendant, submitted, that no interest could by law be recovered on an Irish judgment; and that at all events it could not where the original demand was not of a nature to carry interest; and he cited the case of *Atkinson v. Lord Braybrooke* (a).

LORD TENTERDEN, C. J.—I think that the question should be left to the Jury under all the circumstances of the case.

(a) 4 Camp. 380.

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Witnesses were then called, to shew that the defendant had been generally resident in Baker Street, London, since the year 1817; that he was often seen, and went openly abroad, passing the very shop of the plaintiff; and that his name was to be found in the Court Guide, as resident in Baker Street.

Lord TENTERDEN, C. J., (in summing up).—Actions of debt on judgments are by no means favoured by the Courts; and it is the duty of a person who recovers a judgment in a Court of law, to issue execution in the manner the law has provided, and not to bring an action upon it. The question for your consideration is, not whether the defendant ought to have paid the money (for it is the duty of all men to pay their just debts), but whether the plaintiff had taken due means to discover the defendant, in order to enforce payment by means of an execution founded on his judgment? It is the duty of the creditor to use proper diligence to discover his debtor. On the one hand, the plaintiff has called witnesses, with a view of shewing that he has used all due and reasonable means in endeavouring to find the defendant; and on the other, the defendant has adduced proof to convince you that he might have been found, had inquiries been directed to the proper quarter. You will therefore say, after hearing this conflicting testimony, whether the plaintiff has taken proper steps to find the defendant. If you think that he has, you will give him a verdict, with such interest on the judgment as you think reasonable; but if you think he has not, and that he has lost the benefit of his judgment by his own *laches*, then you will find for the defendant, as the amount of the judgment has been paid into Court.

Verdict for the plaintiff—Damages, 32*l.*, being 5*l.* *per cent.* for eight years.

F. Pollock, and Platt, for the plaintiff.

R. V. Richards, for the defendant.

[Attornies—*G. S. Ford, and Vizard & B.*]

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In the case of *Entwistle v. Shepherd*, 2 T. R. 78, which was an action on a judgment of the Court of Common Pleas, which had been affirmed on writ of error; *Buller, J.*, says:—"It is a question for a Jury to say, whether or not they will give interest on the judgment in the name of damages, for interest may be recovered in an ac-

tion on the judgment, if it be not the practice of the Court to allow interest in the costs." However, in the case of *Atkinson v. Lord Braybrooke*, 4 Camp. 380, Lord *Ellenborough* held, that no interest could be allowed in an action on a judgment of the Supreme Court of Jamaica. See the case of *Arnott v. Redfern*, ante, Vol. 2, p. 88.

BIRCH v. JERVIS.

Oct. 29th.

ASSUMPSIT by the plaintiff as indorsee of a bill of exchange, for 35*l.*, drawn by John Jervis on the defendant, Thomas Jervis, and indorsed by the former.

On the cross-examination of the plaintiff's witness, it appeared that this bill was originally drawn for the purpose of being paid to a creditor of the defendant named Ross, to induce him not to oppose the allowance of the certificate of the defendant, who had sometime before become bankrupt; however, it was stated by Ross, that he gave this bill to the plaintiff in payment of a debt due from him to the plaintiff.

The defence was, that this bill was paid to Ross, to induce him to sign Jervis's certificate, and evidence was given of that fact; and it was also contended, that the plaintiff had given no consideration for the bill when he received it from Ross.

A bill given to a creditor to induce him to sign a bankrupt's certificate is void, in whosever hands it may be, and whatever the consideration given by the holder; but a bill given to a creditor to keep him from taking steps to oppose the certificate, would be good in the hands of a holder for value without notice.

Lord TENTERDEN, C. J.—A bill given to a creditor to

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induce him to sign the certificate of a bankrupt, is void, in whosever hands it may be, and whatever the consideration given by the holder; but if this bill was given to Ross not to induce him to sign the certificate, but merely to keep him from taking any steps to oppose the defendant's getting his certificate, then it would be good in the hands of the plaintiff, if he is a holder for value without notice.

Verdict for the defendant.

Denman, C. S., and *Moody*, for the plaintiff.

Gurney, for the defendant.

[Attornies—*John Hill*, and *J. M. Dodds*.]

By the statute 6 Geo. 4, c. 16, s. 125, it is enacted, That any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such

creditor to consent to or sign such certificate, shall be void, and the money thereby secured or agreed to be paid shall not be recoverable, and the party sued on such contract or security may plead the general issue, and give this act and the special matter in evidence. [See Arch. B. L. 201.]

Oct. 30th.

ROBERTS v. Lady GRESLEY.

If the attorney of a creditor write to *A.* asking payment of a debt due from *B.*, and *A.* answer the letter and pay 200*l.* of the debt; and afterwards the attorney again write to *A.*, asking payment of the residue of the debt, and *A.* send a letter promising payment, this last letter is evidence in an action against *B.*

GOODS sold. Plea—General Issue. The plaintiff relied on a promise of payment by Mr. King, and the whole question was, whether there was sufficient proof that Mr. King was the agent of the defendant at the time of this promise. It appeared that two letters were sent to the defendant, asking payment, to which no answers were re-

turned; and that afterwards the plaintiff's attorney wrote to Mr. King for payment, who answered the letter, and paid 200*l.*, part of the demand; and it further appeared, that the plaintiff's attorney sometime after this wrote again to Mr. King, to ask for payment of 163*l.*, the residue of the debt, to which Mr. King replied by the letter promising payment.

J. Williams, and *Hutchinson*, for the defendant, objected, that there was not sufficient proof that Mr. King was the defendant's agent at the time of the promise to pay.

LORD TENTERDEN, C. J.—It is clearly shewn that he was her agent at one time; and I think there is evidence to go to the Jury that he continued so.

Verdict for the plaintiff.

Sir *J. Scarlett*, and *Comyn*, for the plaintiff.

J. Williams, and *Hutchinson*, for the defendant.

[Attornies.—*Rye*, and *King*.]

EARRATT v. BURGHART.

ASSUMPSIT, for board and lodging furnished to the defendant's son. The plaintiff was a saddler and belt-maker, and sought to recover the sum of 22*l.* 10*s.* for the board and lodging of the defendant's son, at the rate of 10*s.* *per* week. In the month of December, 1826, the son of the defendant went to the house of the plaintiff, on liking, with a view to his being bound as an apprentice. He behaved well for between three and four months, and after that time he became negligent, and the plaintiff complained to his father. His conduct became worse, and at the end of upwards of nine months, the plaintiff, in con-

duct, it will be for the Jury to say whether there was any contract, either express or implied, that his father should pay for his board and lodging.

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If a lad goes on liking with a view to his being bound an apprentice, his intended master cannot charge for his board and lodging for the first month, nor perhaps for so long time as he conducts himself properly. But if he stays for many months, behaving ill after complaints to his father of his mis-

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sequence of some act of misconduct, was obliged to dismiss him from his house. After this, a person called on the defendant twice, to ask payment for the board and lodging; when the defendant said that he would call on the plaintiff.

Brodrick, for the defendant, contended, that as the lad went on liking, with a view to his being taken as an apprentice, the plaintiff was not entitled to recover for his board and lodging; and he relied on the case of *Wells v. Wilkins* (a).

LORD TENTERDEN, C. J. (in summing up).—If a boy goes to a tradesman's house upon liking, with a view to his being bound as an apprentice, I should have thought, that if he had stayed for a month, or any other short time, the intended master could not recover for his board and lodging; but here, it is proved that the defendant's son stayed for more than nine months; that after three months he became so negligent, that his master complained of him; and that, on his becoming worse, he was forced to dismiss him from his house. A demand is made for payment for his board and lodging; and, in answer to this, the defendant says, he will call on the plaintiff. I do not think that his saying that he will call on the plaintiff is to be taken as a distinct acknowledgment of a liability to pay; however, it is still not a denial that any thing is due. The present case materially differs from the case cited. There the master sent the lad away without any reason, and the father desired him to take the lad back, and even offered him for that purpose; here, on the contrary, the defendant's son was dismissed for misconduct. The question I shall leave to you is this, whether there was any contract express or implied to pay for the board and lodging of this lad, for any and what portion of the time he was in the house of the plaintiff. The first month I think you

(a) *Ante*, Vol. 2, p. 231.

must take off, because that is the ordinary time for lads to go on liking; and perhaps you may take off for the three months that he behaved well; and if you think that you can reasonably say that there was no contract, either express or implied, to pay for any part of the board and lodging, then you will find for the defendant; however, if you are satisfied that there was any such contract, you will say how much the plaintiff is reasonably entitled to.

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Verdict for the plaintiff. Damages—8*l*.

Gurney, and *Clarkson*, for the plaintiff.

Brodrick, for the defendant.

[Attornies.—*Dods*, and *A. King*.]

PATTISON v. JONES, Esq.

Nov. 1*st*.

LIBEL. Plea—General Issue. The libels in question were two letters written by the defendant Mr. Jones to Mr. Mornay.

The plaintiff had been butler to Mr. Jones, and had left his service; after that, he went to serve as butler with Mr. Mornay, who took him without a character; but the defendant, on the 25th of April, 1826, wrote the following letter to Mr. Mornay:—

“Sir,—Having been informed that you had an intention of taking my butler into your service, I feel it incumbent upon me, as a neighbour, to inform you that I have just discharged him for misconduct, and that I cannot feel myself justified in recommending it to you to engage him. I have been rather surprised that you have not applied to me for his character, but I shall not think any more about it. I am, &c.,

Wm. Jones.”

If a master in giving the character of a servant in a letter state certain facts, the master, in the defence of an action brought by the servant for libel, is not bound to prove the truth of every fact he stated: it is enough, that he give such evidence as convinces the Jury that he wrote what he did with an honest belief of its truth.
Semble—that a character of a servant, if given *bonâ fide*, is a privileged communication, although it had not been applied for.

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(This was one of the libels complained of). Upon receiving this letter, Mr. Mornay wrote a letter to the defendant, stating, that it was necessary that Mr. Jones should state the particulars of the plaintiff's misconduct, and asking whether he was sober and honest. The letter then continued, "I beg to set your mind perfectly at ease as to any information he might afford me relating to what passed between the sale and delivery of possession of this estate, as I am fully apprised of all the particulars."

To this letter the defendant, on the 26th of April, wrote an answer, (the second libel), in the following terms:—

"Sir,—I have no hesitation in informing you, that I discharged my butler, not only on account of drunkenness and absence from duty in my house, but on account of my having great reason to believe that he had made free with a great deal of my wines, &c., in which I found a very great deficiency upon an examination with the cellar-man who packed it up to be brought down to Putney, who took a regular account of it, which I have got. Pattison had the audacity to open all those packages, without any authority from me, and he acknowledged that fact yesterday before witnesses, when he was so conscious of his misconduct, that he said he would not take any situation in the neighbourhood of Putney. Under these circumstances, I thought it right and neighbourly to put you upon your guard against him.

"As to any information he can give about the furniture, as insinuated in your letter, I can set him and every body else at defiance. I intended to have furnished you with more information, not only about him, but about another person; but as you have not treated the information I have already given you in the way I took it for granted you would have done, I shall decline doing so, being satisfied that you will in time be convinced of the rectitude of my conduct. After what I told Pattison about the wine yesterday, I do not think that he will like to live in the neigh-

bourhood of Putney, but I have no objection to your taking him into your service, if you think that you can do so with propriety. I am &c.

Wm. Jones."

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Sir J. Scarlett.—There is no evidence of malice. That is a necessary proof on the part of the plaintiff in cases of servant's character.

Denman, C. S., contra.—There is no case that goes to protect an unasked communication by a former master, which the first of these letters clearly is; and further, the malice may be inferred from the letters themselves.

Lord TENTERDEN, C. J.—I will not stop the case on this objection.

To shew the *bona fides* of the communication, evidence was given, that the plaintiff was often muddled, though not drunk; and that, on the removal of a large quantity of wine, several dozens were missing. But there was no evidence to shew that they must have been taken by the plaintiff.

Lord TENTERDEN, C. J., (in summing up)—In ordinary cases of libel, malice is implied; but in cases of letters giving the character of servants, where that character is applied for, there is a burden of proof on the plaintiff to shew malice; however, where, as in this case, the first letter was sent by the former master, unasked, I am not satisfied that that rule applies. The question is, whether these communications were made by the defendant honestly and fairly, according to the best of his judgment and belief, or were these letters written from malicious motives. In such a case as this, I am of opinion, that the defendant is not bound strictly to prove every fact stated in the letters; it is enough, if there be such proof as convinces

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the Jury that the defendant wrote what he did with an honest belief of its truth.

Verdict for the plaintiff. Damages—80*l*.

Denman, and *Platt*, for the plaintiff.

Sir *J. Scarlett*, *Gurney*, and *Coltman*, for the defendant.

[Attornies—*W. Bowler*, and *Rogers & Son*.]

IN the ensuing Term, Sir *J. Scarlett* moved for a new trial, on the ground that these letters were privileged communications, and that there was no sufficient proof that the defendant was actuated by malice.

LORD TENTERDEN, C. J.—I thought at the trial, that, as the correspondence originated with Mr. Jones, this case differed from all those that had preceded it.

Sir *J. Scarlett*.—That applies only to the first letter. The second communication was asked for by Mr. Mor-nay.

BAYLEY, J.—The second letter would not have been asked for, if the first had not been sent.

LORD TENTERDEN, C. J.—I doubted whether I should have received evidence for the defendant, as there was no special plea; however, I left it to the Jury on the questions, whether Mr. Jones was actuated by malice, or whether he wished merely to keep another gentleman from taking a bad servant; and I confess I was a good deal struck by the observation, that if a person knew that another was going to take a bad servant, he might fairly tell that other what he knew respecting such servant.

BAYLEY, J.—This case has been put in the fairest way for the defendant, by considering this as a privileged communication. To make it a privileged communication, I do not say, that it is necessary for the defendant to be set in motion by an application from the person who is going to take the party into his service, for if the defendant knows that a person is going to take a servant that he ought not, he may tell him so, and put him upon asking questions. But still the Jury must consider whether he does this *bona fide*, or from malicious motives.

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LITLEDALE, J.—If this was a privileged communication, the defendant was at liberty to go into his whole case under the general issue, and then it became a question of *bona fides*. That was purely a question for the Jury, and upon that question they have decided. I think the case is different where a man volunteers to send to the intended master, and where he is applied to for the character; and if a person does volunteer, I think the Jury may reasonably require more evidence to convince them of the *bona fides*.

Rule refused.

See the cases of *Blackburn v.* and also the case of *Robertson v. Blackburn, ante*, p. 146, and 1 M. *Macdougall, ante*, p. 259. & P. 33, and the cases there cited;

TOD and Others v. Earl of WINCHELSEA and Another.

Nov. 3rd.

ISSUE directed by the Master of the Rolls to try whether the will of the Duke of Roxburgh was duly executed. This was a new trial of the case reported *ante*, Vol. 2, p. 488.

A witness examined on the trial of an issue out of Chancery, died; a new trial was granted, and on the new trial parol evidence was allowed to be given of what

Mr. Tate, who was examined as a witness at the former

this witness had deposed on the former trial, notwithstanding there was the usual order for reading the depositions in equity of such witnesses as had died since the first trial.

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trial, to shew the situation of the rooms, was proved to be dead.

Sir *J. Scarlett*, wished to go into proof of what this witness had said in his evidence on the former trial.

Tindal, S. G.—This is an issue directed by the Master of the Rolls, and there is the usual order of the Master of the Rolls for the reading of the depositions in the equity suit, of such of the witnesses as have died since the former trial. I therefore submit that the other side is not at liberty to give evidence of what Mr. Tate proved on the former trial, but they must read his deposition taken in Chancery.

Sir *J. Scarlett*, *contra*.—This cause must be tried like every other. It is the same cause of action, and between the same parties.

Lord TENTERDEN, C. J.—I think I must receive the evidence.

The evidence given by Mr. Tate on the former trial was read by Mr. Oliver, the short-hand-writer, from his notes.

Lord TENTERDEN, C. J., (in summing up)—By the statute of frauds, 29 Car. 2, c. 3, a will of lands must be attested by three witnesses in the *presence* of the testator. However, by the word *presence*, it is not meant that it should be done in the actual sight of the testator; and it is sufficient that the will should be attested in such a situation that the testator *might* see the witnesses sign the attestation. Such is the result of the authorities; and indeed I am not aware that my opinion delivered at the last trial has ever been questioned.

Verdict for the plaintiff.

Sir *J. Scarlett, Gurney, Jacob, and Jardine*, for the plaintiffs.

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ToD

Tindal, S. G., Brougham, and Stuart, for the defendants.

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[Attornies—*E. S. Foss, and Rogers & Home.*]

If a witness, who has been examined on a former action *between the same parties, and where the point in issue was the same* as in the second action, is since dead, what he swore at the first trial may be proved by one who heard him give evidence. 1 Phill. Ev. 274. But the person called to prove what a deceased witness said, must undertake to repeat *precisely his very*

words, and not merely to swear to their effect. *Ib.* For the purpose of introducing an account of what a deceased witness swore on the first trial, the *Nisi Prius* record, and the *postea* indorsed thereon, are good evidence to shew that the cause was brought on for trial, or that it was actually tried. *Id.* 275. See also *Doe dem. Lloyd v. Passingham, ante*, Vol. 2, p. 445.

OXFORD SPRING CIRCUIT.

1828.

BEFORE MR. JUSTICE PARK & MR. BARON VAUGHAN.

BERKSHIRE ASSIZES.

BEFORE MR. BARON VAUGHAN.

March 4th.

REX *v.* EDMEDS and Others.

If game-keepers attempt to apprehend a gang of night poachers, and one of the game-keepers be shot by one of the poachers, this will be murder in all the poachers, unless it be proved that either of them separated himself from the rest, so as to shew that he did not join in the act.

THE prisoners, eight in number, were charged with shooting James Mancey, with an intent to murder him.

It appeared, that at about 11 o'clock in the night of the 6th of January, the prisoners, each having a gun, were out for the purpose of shooting pheasants, in a coppice belonging to Mr. Crutchley, at Sunning-hill; and that on James Mancey, and other game-keepers and servants of Mr. Crutchley, going towards them for the purpose of taking them into custody, the prisoners formed into two lines, and pointed their guns at the game-keepers, saying, that they would shoot them; when a shot was fired, which wounded James Mancey. Some of the game-keepers' party were severely beaten over the head with the gun-barrels; but no other shot was fired, except that by which Mancey was wounded.

Carrington, for the prisoners.—I submit, that under the stat. 57 Geo. 3, c. 90 (a), game-keepers and other persons were only *permitted* to apprehend night poachers, but not *enjoined* to do so; because, if they were so enjoined, every person, no matter what his station, would be liable to an indictment if he did not go and apprehend persons that he saw poaching, just the same as a constable, who, seeing a felony committed, should neglect to apprehend the felon. Now, if game-keepers are only *permitted* to apprehend, the killing them in a resistance would only be manslaughter; because, it is laid down by Lord Hale (b), that to kill a constable who is taking a felon, is murder; because he is not only *permitted* but *enjoined* to take the felon, and is liable to indictment if he does not do so; whereas, a private person being only *permitted* to arrest on suspicion of felony, the killing him is but manslaughter. There is also another point, which is this: If the shooting of Mancey was not in pursuance of, but was beside the common unlawful intent for which these parties assembled, the only person who can be found guilty is the one who actually fired the gun. To make the whole party guilty, the act must be done strictly in prosecution of the purpose for which the party was assembled. Now, their common intent was only to kill game, and it is clear that there was no common intent to shoot this map, because only one gun was fired instead of the whole number.

VAUGHAN, B.—I am of opinion, that when this act of Parliament empowered certain parties to apprehend persons who were out at night armed for the destruction of game, it gave them the same protection in the execution of that power, which the law affords to constables in the execution

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(a) This statute is now repealed by the statute 9 Geo. 4, c. 69. However, this latter statute contains a clause respecting the apprehension of offenders, which is set out in Carr. Supp. p. cxli.
 (b) 2 P. C. 90—92.

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of their duty. These persons were in the actual commission of the offence; and this is nothing like the case put, of a private person arresting another on suspicion of felony. With respect to the other point, that is rather a question for the Jury; but still, on this evidence, it is quite clear what the common purpose was. They all draw up in lines, and point their guns at the game-keepers, and they are all giving their countenance and assistance to the one of them who actually fires the gun. If it could be shewn that either of them separated himself from the rest, and shewed distinctly that he would have no hand in what they were doing, the objection would have much weight in it.

The Jury found three of the prisoners guilty, and acquitted the others.

Curwood, and *Justice*, for the prosecution.

Carrington, for the prisoners.

[Attornies—*W. Henson*, for the prosecution; *Burgess*,—and *Compigné & D.*, for the respective prisoners.]

As the two following cases relate to the same points as the above, we have thought it best to insert them here.

WORCESTER.—*Coram* PARK, J.

March 11th.

REX v. HAWKINS and Others.

If a gang of poachers attack a game-keeper, and leave him senseless on the ground, and one of them return and steal his money, &c. that one only can be convicted of the robbery, as it was not in pursuance of any common intent.

THE indictment charged the prisoners, and a person named Williams, (who was not in custody), with robbing William Tucker.

It appeared that the prisoners were out poaching in the night, in company with Williams; and that Tucker, who was the game-keeper of Mr. West, met them as he was going his rounds, when the whole party set

that one only can be convicted of the robbery, as it was not in pursuance of any common intent.

upon him and beat him till he was senseless; and that, on his recovering, he missed his pocket-book and money, and his gun. However, to connect some of the prisoners with the offence, an accomplice was called, who stated that they all beat the game-keeper, and left him lying on the ground; and that after they had gone some little distance Williams returned and robbed him (a).

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PARK, J.—It appears to me that Williams is alone guilty of this robbery. It appears that there was no common intent to steal the keeper's property. They went out with a common intent to kill game, and perhaps to resist the keepers; but the whole intention of stealing the property is confined to Williams alone. They must be acquitted of the robbery.

Verdict—Not Guilty (b).

Ludlow, Serjt., and Carrington, for the prosecution.

Godson, for the prisoners.

[Attornies—*Wyatt & Tibbuts, and Parker.*]

(a) To make all guilty, "the fact must appear to have been committed strictly in prosecution of the purpose for which the party was assembled; and therefore, if divers persons be engaged in an unlawful act, and one of them, with malice prepense against one of his companions, kills him, the rest are not concerned in the guilt of that act, because it hath no connexion with the crime in contemplation." So, where two men were beating a third in the street, and a stranger made an observation on the cruelty of the act, and one of them stabbed him, this was not murder in both, though both were committing an unlawful act; because only one of them intended to do injury to the person killed. 1 Curw. Hawk. p. 101.

In *Plummer's case*, a smuggler,

in a scuffle with the revenue officers, shot one of his comrades, (upon a grudge of his own); the question was, whether the whole gang were guilty of murder: and it was held, that *as it did not appear that the gun was discharged in prosecution of the purpose for which the party had assembled*, it was only murder in him who did it. Cited 1 Russell, 652; *Hodgson's case*, 1 Leach, 6, S. P. And if several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maim a pursuer to avoid being taken, the others are not to be considered principals in such act. *Rex v. White*, Russ. & Ry. C. C. R. 99.

(b) They were afterwards convicted on an indictment for night poaching.

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GLOUCESTER.—*Coram* VAUGHAN, B.*April 10th.*

REX v. WHITHORNE and Others.

Where game-keepers had seized two persons who were poaching in the night, and they (having surrendered) called to a third, who came up and killed one of the game-keepers, this is murder in all, though the two struck no blow, and though the game-keepers had not announced in what capacity they had apprehended them.

MURDER.—The prisoners Whithorne, Perry, and Smith, were charged with the murder of Richard Rounce.

It appeared that the deceased and others, who were the game-keepers and servants of Mr. Waller, found the prisoners, Perry and Smith, out for the purpose of catching hares, on the night of the 26th of November. It also appeared that they collared Perry and Smith, and after some blows on both sides those prisoners stood quite still; but that soon after they called to the prisoner Whithorne, who came up, and, with a stick shod with iron, beat the game-keepers on the head, rescued the other two prisoners, and killed the deceased.

Phillpotts, for the prisoners, objected, that as the game-keepers did not announce to the prisoners who they were, the arrest was illegal; and further, that as their duty was at most to apprehend only, and it was in proof that they beat the prisoners, that would reduce the offence to manslaughter; and that at any rate the charge could not be supported as against Perry and Smith, because, after the blows, they submitted to be taken, and had nothing to do with the killing of the deceased.

VAUGHAN, B.—If those two had acquiesced, and had staid perfectly passive, that would be so; but it is proved that they called to Whithorne, who came up and killed this man. With respect to the keepers' not announcing who they were, there is no pretence for saying that the prisoners did not know that perfectly well. And they did not make any question of their authority. They did not say, "You have no right to take us—Who are you?" or any thing of that sort. I am of opinion that this was a legal apprehension, and, being so, all the legal consequences must follow.

Verdict—Not Guilty.

Justice and Maclean, for the prosecution.*Phillpotts*, for the prisoners.[Attornies—*Pruen & Co.*, and *Tarn*.]

WORCESTER ASSIZES.

BEFORE MR. BARON VAUGHAN.

WILLIES v. FARLEY, Esq.

March 10th.

TROVER. It was proved, that on the 13th of July, 1827, the plaintiff, Edward Willies, sued out a writ of *feri facias* against the goods of John Willies; and that the defendant, as Sheriff of Worcestershire, on the 16th of July, executed a bill of sale of those goods, which were the goods in question, to the plaintiff; and that on the 9th of September, in the same year, the defendant as Sheriff seized these same goods under another execution against John Willies at the suit of Messrs. Homfray & Co.

The defence intended to be set up was, that John Willies remained in possession, and that the plaintiff's execution was merely colourable, and therefore that the goods, up to the time of the second execution, really belonged to John Willies. To shew this, the defendant's counsel wished to ask the sheriff's officer, in cross-examination, what John Willies said when Messrs. Homfray's execution went in.

A. sued out a writ of *fi. fa.* against the goods of B., and the sheriff executed a bill of sale of certain goods to A. After this, B. remained in possession of the goods, and the sheriff again took them, under another execution against B.:—Held, that in an action brought by A. against the sheriff for taking these goods, the declarations of B. were evidence for the defendant, to shew that A's execution was merely colourable.

Curwood, for the plaintiff, objected, that what John Willies said as to the property of the goods, was not evidence, as he might be called.

VAUGHAN, B.—What John Willies said as to whose the goods were, he being then in possession of the goods, is evidence.

This evidence was received, and the officer also proved, that the plaintiff had said to him, that he had sued out the first execution, to protect the goods from Messrs. Homfray.

Nonsuit.

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Curwood, and Carrington, for the plaintiff.

Campbell, and Corbet, for the defendant.

[Attornies—*R. Gude, and Grazebrook.*]

STAFFORD ASSIZES.

BEFORE MR. BARON VAUGHAN.

March 19th.

REX v. ELDERSHAW.

A boy under the age of fourteen, cannot be convicted of an assault with intent to commit a rape.

ASSAULT, with intent to commit a rape upon Harriet Finney; second count, for a common assault.

The prisoner was a boy under twelve years of age, and Harriet Finney a child of fourteen months old. It was proved that the prisoner said to another boy, that he "had had concern with the child three times;" and the mother of the child, a few days after, perceived that she had marks of violence on her person.

VAUGHAN, B.—This boy being under fourteen, he cannot, by law, be found guilty of a rape, except as a principal in the second degree. I am, therefore, of opinion, that he cannot be convicted on the first count of this indictment. From his age, the law concludes that it is impossible for him to complete the offence, and that, in my judgment, must be held to negative the intent alleged in the first count of this indictment.

Verdict.—Guilty of a common assault only.

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REX v. CURRAN.

March 19th.

INDICTMENT for cutting Robert Sutton, with intent to murder him.

It appeared that the prosecutor, Robert Sutton, was the servant of a farmer, named Foster, who directed him to apprehend the prisoner for stealing the turnips. The prosecutor very soon after this found the prisoner in a field adjoining to Foster's turnip field, with a quantity of turnips in his possession. The prosecutor took him into custody, and proceeded with him first to Foster's house, and thence to the house of the constable; but on their way there, the prisoner said he would go no further, and drew a knife, with which he severely wounded the prosecutor.

If the servant of the owner of property find a party actually committing an offence against the stat. 7 & 8 Geo. 4, c. 29, (the larceny act) and apprehend him under sect. 63 of that act, and, while taking the party to a magistrate, such party kill him, this will be murder; but if the servant either did not see him in the actual commission of the offence, or be taking him to any other place than before a magistrate, it will not be murder.

On the part of the prosecution, it was contended, that the prosecutor, Sutton, as the servant of Foster, had a right to apprehend the prisoner, under the 63rd sect. of the stat. 7 & 8 Geo. 4, c. 29; and therefore, that if Sutton had died, the offence of the prisoner would have been murder.

VAUGHAN, B.—This resolves itself into a mere question of law. By one of the sections of the stat. 7 & 8 Geo. 4, c. 29, stealing vegetable productions is made an offence, and, by the 63rd section, the owner of the property, or his servants, are empowered to apprehend persons, found committing offences against that act, and to take them forthwith before a justice of the peace. Now here, this man was not found committing the offence, but was in the next field; which brings the case neither within the letter nor the spirit of this enactment. Again, by this enactment, the owner or servant who apprehends, must take the offender forthwith before a justice. Now, this man was actually taken to Foster's, and was about to be taken to the constable's, all which is clearly wrong. If this

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prisoner had been found in the very act of stealing the turnips, and had been taken by a servant of the owner, to be carried forthwith before a magistrate, I should have said, that the servant had all the protection of a constable; and that if the prisoner had cut or stabbed him with an intention to kill, it would have been a capital offence.

Verdict—Not Guilty.

Whateley, for the prosecution.

By the statute 7 & 8 Geo. 4, c. 29, s. 43, persons who shall steal or destroy, or damage with intent to steal, "any cultivated root or plant, used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land open or inclosed, not being a garden, orchard, or nursery ground," are punishable on a summary conviction by one justice of the peace. And by sect. 63 of the same stat. it is enacted, that "any person found committing any offence, punishable, either upon indictment or upon summary conviction, by virtue of this act, except only the offence of angling in the day time, may be immediately apprehended without a warrant, by any peace officer, or by the owner of the property on or with respect to which the offence shall be committed, or by his servant or any person authorized by him, and

forthwith taken before some neighbouring justice of the peace, to be dealt with according to law; and if any credible witness shall prove, upon oath before a justice of the peace, a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever, on or with respect to which any such offence shall have been committed, the justice may grant a warrant to search for such property, as in the case of stolen goods; and any person, to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorized, and, if in his power, is required to apprehend and forthwith to carry before a justice of the peace the party offering the same, together with such property, to be dealt with according to law."

1828.

BEFORE MR. JUSTICE PARK.

WARD v. NANNEY, Clerk.

March 17th.

ASSUMPSIT for goods sold. Plea—General Issue. It appeared that the plaintiff, who kept the Goat public-house, at Stafford, had supplied beer to the voters there, under the following circumstances:—

At the general election, in the summer of the year 1826, Mr. Ironmonger was returned jointly with Mr. Be-nison, to represent the borough of Stafford, after a con-tested election, at which Mr. Campbell was the unsuccessful candidate. Before the meeting of Parliament, in the beginning of the year 1827, Mr. Ironmonger died, so that he never took his seat in the house.

In the month of August 1826, just after the death of Mr. Ironmonger, the defendant, who was a clergyman, canvassed the borough in favour of his brother Sir W. Wynn, and directed the plaintiff to supply the voters with beer. The plaintiff did so, and the defendant paid the amount of the plaintiff's bill up to the month of October, when he renewed his directions to the plaintiff, who supplied more beer to the voters, to the amount of 25*l.* 9*s.* to recover which this action was brought.

Campbell, for the defendant.—This plaintiff cannot re-cover. The representation of the borough of Stafford was vacant by the decease of Mr. Ironmonger, and there-fore this supply of beer is within the treating act, 7 & 8 W. 3, c. 4; by which it is enacted, that no person to be elected to serve in Parliament, for any county, city, &c., shall, after the teste of the writ of summons, or after any such place becomes vacant, either directly or indirectly, by himself or others, give meat, drink, &c. to the voters.

At a general election, A. was, after a contest, returned to serve in Parlia-ment; A. died before the next meeting of Parli-ament:—Held that, immediat-ly on his death, the representa-tion of that place "became vacant," within the meaning of the treating act, 7 & 8 W. 3, c. 4; and that if B., who was nei-ther a candi-date nor the agent of a candi-date, canvassed for C., and ordered beer for the voters, after such vacancy, this was within the act, even though it was not proved that C. either knew of the canvass or of the treat-ing: and it was therefore held, that an inn-keeper could not recover against B. for beer supplied to those voters by his order.

The treating act extends to an unsuccessful candidate who did not come to the poll.

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Jervis, and Carwood, contra.—As Mr. Ironmonger had never taken his seat, there could not be said to be a vacancy by the mere fact of his death; for, had the unsuccessful candidate petitioned, and shewn, before a committee of the House of Commons, that he ought to have been returned, the committee would have seated him on his petition; and so Mr. Ironmonger's death would have caused no vacancy. And besides, the treating act applies, at most, only to treating by the candidate, or by his agents; now here, though Mr. Nanney, the defendant, treated the voters, yet he was no agent of the candidate; and the candidate does not appear to have known that the defendant was trying to secure his election. Again, this statute only relates to treating by or on behalf of persons *to be elected*: which only applies to a successful candidate. Sir W. Wynn was not a successful candidate, for, in fact, he withdrew from the contest.

PARK, J.—I am of opinion that the representation was vacant on the death of Mr. Ironmonger; he was the party returned, and although it is possible that the return might have been quashed, and some other gentleman seated, on a petition, yet that never was so. If you could shew that another person was seated by petition, and that Mr. Ironmonger's return was quashed, I might hold that his death made no vacancy; but as the matter really stood, his death did, in fact, cause the vacancy. With respect to the act only extending to treating by candidates and their agents, I think this case is clearly within it, for it includes all treating by the candidates themselves, "or by any other ways or means on his or their behalf." Now, it is impossible to say that this was not a treating on behalf of Sir W. Wynn. With respect to the other point raised, that the treating act applies only to successful candidates, I am decidedly of opinion that that is not so.

Nonsuit.

Jervis, and *Curwood*, for the plaintiff.

Campbell, for the defendant.

[Attornies—*Passman*, and *R. W. Williams*.]

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By the stat. 7 & 8 W. 3, c. 4, it is enacted, "That no person or persons hereafter to be elected to serve in Parliament for any county, city, town, borough, port, or place within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, after the *tate* of the writ of summons to Parliament, or after the *tate* or the issuing out or ordering of the writ or writs of election upon the calling or summoning of any Parliament hereafter, or after any such place becomes vacant hereafter in the time of this present or of any other Parliament, shall or do hereafter, by himself or themselves, or by any other ways or means on his or their behalf, or at his or their charge, before his or their election to serve in Parliament for any county, city, town, borough, port, or place within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, directly or in-

directly give, present, or allow to any person or persons, having voice or vote in such election, any money, meat, drink, entertainment or provision, or make any present, gift, reward or entertainment, or shall, at any time hereafter, make any promise, agreement, obligation, or engagement, to give or allow any money, meat, drink, provision, present, reward or entertainment, to or for any such person or persons in particular, or to any such county, city, town, borough, port, or place in general, or to or for the use, advantage, benefit, employment, profit or preferment of any such person or persons, place or places, in order to be elected, or for being elected, to serve in Parliament for such county, city, borough, town, port, or place." See the case of *Richardson v. Webster*, *Bart. ante*, p. 128, and the case there cited.

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SHREWSBURY ASSIZES.

BEFORE MR. BARON VAUGHAN.

March 24th. DOR on the demise of OLDNALL and Wife v. DEAKIN and WOOLEY.

A will of lands executed more than thirty years ago, is admissible in evidence without calling the subscribing witness, although the testator has died within thirty years, and it be proved that one of the subscribing witnesses is still alive.

A. claimed in ejectment as heir-at-law of B. A. traced his pedigree through the youngest son of a common ancestor, who, in the year 1689, had four elder sons, whose descendants (if any) would have had a better title than B.:—Held, that the length of time was a sufficient ground to presume their deaths; and that the Court would take it that they all died without issue, unless there was some evidence to induce a presumption that they, or some of them, married and left issue.

EJECTMENT by the lessor of the plaintiff, Mrs. Oldnall, to recover certain estates in the county of Salop, as the devisee of Frances Wooley. The estates had never been in the actual possession of Frances Wooley, but she was alleged to have been entitled to them as the heir of Thomas Wooley of Wood-hall, Esq., who, by his will, which bore date in the year 1798, devised these estates to his widow for life, and, after her decease, to his own right heir. Thomas Wooley, of Wood-hall, Esq. died in the year 1800, and the possession went according to the will, as his widow enjoyed the estates to the time of her death, in the year 1824.

The counsel for the lessor of the plaintiff wished to give this will in evidence; however, it appeared, that, though the will by its date was more than thirty years old, yet thirty years had not elapsed since the death of the testator; and it also appeared that one of the subscribing witnesses was alive, but not in Court.

Campbell, for the defendant.—This will cannot be read without calling the subscribing witness. A deed operates *in presenti*; and though to a deed no witness is required by law; yet, if there be one, that witness must be called, if it be within thirty years of the date of the deed. Now, to a will of lands, three witnesses are required by law, and a will does not operate till the death of the party. I therefore submit, that if either of the witnesses is in being, that witness must be called, more especially if the will has not been in operation for thirty years.

VAUGHAN, B.—I shall admit this will in evidence without the subscribing witness being called. The rule of thirty years is founded on the presumption that the witnesses are dead; and, therefore, as this will was executed more than thirty years ago, I shall admit it.

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The will was read (a).

To shew the title of Frances Wooley, as the heir-at-law of Thomas Wooley of Wood-hall (the person last seised in fee), it was opened that Thomas Wooley of Wood-hall was the grandson of William, the eldest son of Thomas Wooley Senr.; and that Frances Wooley, under whom the lessors of the plaintiff claimed, was the grand-daughter of Edward, the youngest son of the same Thomas Wooley Senr. To prove that Edward was the sixth son of Thomas Wooley, the marriage settlement of William Wooley, the eldest son of Thomas, was put in. This marriage settlement was dated in the year 1689, and it appeared therefrom that Thomas Wooley Senr. had six sons, of whom Edward was the youngest. There was other very distinct evidence of the relationship in which Frances Wooley stood to Thomas Wooley of Wood-hall (the person last seised), but there was no evidence whether the other four of the six sons of Thomas Wooley Senr. had died with or without issue. However, to raise a presumption that they had died without issue, the will of William Wooley, the eldest son of Thomas, (whose marriage-settlement was put in as above stated), was read, and also the will of George Wooley, another member of the family, neither of which mentioned or alluded to either of those sons of Thomas Wooley Senr., or to any descendant of either of them.

Campbell, for the defendants, contended, that the lessors of the plaintiff were not only bound to shew that Frances

(a) On this point, see the case *ante*, Vol. 2, p. 441, and the cases of *Doe dem. Lloyd v. Passingham*, collected in the note, *Ib.* 442.

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Wooley was descended from Edward Wooley, the sixth son of the common ancestor; but must also prove, that all the elder branches of the family were extinct.

VAUGHAN, B.—I think that that is what I must leave to the Jury. It will be for them to say, whether, from the evidence given in this case, they have fair reason to suppose that the descendants of these sons of Thomas Wooley Senr. (if they ever had any) are all extinct. These sons are never heard of anywhere, since the date of the marriage-settlement. The wills neither mention nor allude to them, nor to any of their descendants; and no evidence is adduced by the defendants to give the Jury the slightest idea of their existence (a).

Verdict for the plaintiff.

(a) As to the time when the death of a party shall be presumed, Lord *Ellenborough*, in the case of *Doe dem. George v. Jesson*, 6 East, 85, says: "As to the period when a party might be supposed to have died, according to the statute 19 Car. 2, c. 6, with respect to leases dependant on lives, and also according to the statute of bigamy, 1 Jac. 1, c. 11, the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living. Therefore, in the absence of all other evidence, to shew that he was living at a later period, there was fair ground for the Jury to presume that he was dead at the end of seven years from the time when there was the last account of him." The statute of bigamy, 1

Jac. 1, c. 11, has been repealed by the statute 9 Geo. 4, c. 31; however, by the latter statute, sect. 22, no person is punishable for bigamy, "whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time." This statute, therefore, puts the presumption of the death on the fact, that the party has not been heard of for seven years.

With respect to the party having died without issue: in the case of *Doe dem. Banning v. Griffin*, 15 East, 293, one of the family proved, that, many years before, a younger brother of the person last seized had gone abroad, and that the reputation of the family was, that he had died there; and that the witness had never heard in the family of his having been married; and

Taunton, Russell, Serjt., and *Curwood*, for the lessors
of the plaintiff.

Campbell, Richards, and *Whateley*, for the defendants.

[Attornies—*Hyde*, and *Cree*.]

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In the ensuing Term, *Campbell* applied to the Court of King's Bench for a new trial, on two grounds:—*First*, that the will of Thomas Wooley of Wood-hall ought not to have been received in evidence without its being proved by the subscribing witness, as it came into operation within thirty years, though dated more than thirty years ago; and *secondly*, that it was incumbent on the lessors of the plaintiff to prove the extinction of all the elder sons of Thomas Wooley Senr., and of all their descendants; as, without that proof, Frances Wooley was not the heir-at-law of Thomas Wooley of Wood-hall: he admitted that the deaths of the sons might be inferred from the length of time since the year 1689; but he contended that it must also be shewn that they died without issue.

Lord TENTERDEN, C. J.—I think that there is no weight in either of these objections. The presumption, that, after the lapse of thirty years, the subscribing witnesses may be dead, equally applies to the time of the execution

this was held to be *prima facie* evidence that the party was dead without lawful issue, to entitle the next claimant by descent to recover in ejectment. However, in the case of *Richards v. Richards* (cited, *Id.* 294), the lessor of the plaintiff shewed the death of his elder brothers, but not that they died without issue, and no negative evidence of their marriage was given; and there the Court held,

that it must be proved that they died without issue, and that “the plaintiff must remove every *possibility of title* in another person before he can recover, no presumption being to be admitted against the person in possession.” This case is cited from Ford's MSS., but it is material to consider whether it is not overruled by the principal case.

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of a will, and to the execution of a deed. After thirty years from the execution of either, the parties may very fairly presume that the witnesses are dead, and save themselves the trouble of looking after them. With respect to the other point, the only evidence before us is, that the parties who would have had a better title than Frances Wooley were in existence in the year 1689. Now I think the Jury might certainly presume that those parties were all dead before this ejectment was brought; but then we are asked to presume that some of them married and left issue. That is calling on us to presume an affirmative fact, of which we have no evidence, and which there is nothing to lead us to presume.

BAYLEY, J.—We must presume that things remain in the same state in which they are proved to be; unless there is something to shew that the state of things has been altered. It is shewn, that these sons of Thomas Wooley were alive at the time of the execution of the marriage-settlement; and if they were alive now, it is quite clear that they must be each of them nearly a hundred and fifty years old. I think, therefore, that the Jury might very properly presume that they were dead; and if so, we have nothing to lead us to suppose that they ever either married or had issue, and in the absence of all evidence we cannot presume it.

LITLEDALE, J. concurred.

Rule refused (a).

(a) Having been unavoidably absent at the time when this motion was made, we are indebted to the kindness of one of the counsel in the case for this report of it.

BEFORE MR. JUSTICE PARK.

CASH *v.* GILES.

March 24th.

ASSUMPSIT, to recover the price of a threshing-machine. It appeared, that the defendant bought the threshing-machine of the plaintiff, in the year 1822; and the defendant called several witnesses, who proved that the machine was of no value, because it did not thresh the corn out properly, but, on the contrary, left about one-third of it in the straw. The defendant had never returned the machine, though his witnesses proved that he had only used it twice.

If one order a certain machine, e. g. a threshing-machine, which, when sent to him, turns out to be unfit for use, he should either return it immediately, or else give immediate notice to the vendor to fetch it away; for if he keep it a long time without doing either, he will be taken to have waived all objections to its goodness.

PARK, J.—If the defendant meant to insist that this threshing-machine was not a good one, and suitable to its intended purpose, it was his duty either to have immediately returned it, or to have given immediate notice to the plaintiff to fetch it away, as it was of no use; now, instead of that, he keeps it for several years. I am clearly of opinion, that, as he has done so, he has waived all objections to its goodness, and is bound to pay for it.

Verdict for the plaintiff. Damages—25*l.*

Curwood, and *Carrington*, for the plaintiff.

Campbell, and *Whateley*, for the defendant.

[Attornies—*Wood*, and *Collins*.]

See the cases of *Milner v. Tucker*, ante, Vol. 1, p. 15, and *Percival v. Blake*, ante, Vol. 2, p. 514.

1828.

GLOUCESTER ASSIZES.

BEFORE MR. JUSTICE PARK.

April 2nd.

BARTLETT v. LEIGHTON.

An affidavit to verify a plea *puis darrein continuance*, at the Assizes, sworn at the Assize town on the commission-day of the Assizes, before a commissioner for taking affidavits, is not good. It should be sworn before one of the Judges of Assize; however, the Judge at N. P. will allow it to be re-sworn before him.

DEBT. When the case was called on, and before the Jury were sworn, the defendant's counsel put in a plea of release *puis darrein continuance*. The affidavit to verify it was sworn at Gloucester on the 2nd of April, before a commissioner for taking affidavits. The second of April was the commission day for the holding of the assizes.

Russell, Serjt., for the plaintiff, objected—That the affidavit was not good, unless sworn before one of the Judges of Assize.

Busby, contra, submitted—That if that were so, perhaps his Lordship would allow it to be re-sworn.

PARK, J. (having conferred with VAUGHAN, B.)—My learned brother and myself are both of opinion, that the affidavit should have been sworn before one of the Judges of Assize, as the commissions of the Judges supersede all other commissions in the town where the Assize is held; however, we think we ought to allow the affidavit to be re-sworn before me.

This was accordingly done.

Russell, Serjt., and *Shutt*, for the plaintiff.

Busby, for the defendant.

[Attornies—Mason, and Leighton.]

See the case of *Pascall v. Horsley*, ante, p. 372.

1828.

BEFORE MR. BARON VAUGHAN.

—
 REX v. HALL.

April 8th.

INDICTMENT for robbing John Green, a game-keeper of Lord Ducie, of three hare wires and a pheasant. It appeared, that the prisoner had set three wires in a field belonging to Lord Ducie, in one of which this pheasant was caught; and that Green, the game-keeper, seeing this, took up the wires and pheasant, and put them into his pocket; and it further appeared, that the prisoner, soon after this, came up and said: "Have you got my wires?" The gamekeeper replied, that he had, and a pheasant that was caught in one of them. The prisoner then asked the gamekeeper to give the pheasant and wires up to him, which the gamekeeper refused; whereupon the prisoner lifted up a large stick, and threatened to beat the gamekeeper's brains out if he did not give them up. The gamekeeper fearing violence did so.

A. had set wires in which game was caught; B. a gamekeeper found them, and took the game and wires for the use of the lord of the manor; A. demanded them with menaces, and B. gave them up: The Jury found that A. acted under a *bond fide* impression that the game and wires were his property:—Held, no robbery.

Maclean, for the prosecution, contended, that, by law, the prisoner could have no property in either the wires or the pheasant; and, as the gamekeeper had seized them for the use of the lord of the manor, under the statute 5 Ann. c. 14, s. 4, it was a robbery to take them from him by violence.

VAUGHAN, B.—I shall leave it to the Jury to say whether the prisoner acted on an impression that the wires and pheasant were his property; for, however he might be liable to penalties for having them in his possession, yet, if the Jury think that he took them under a *bond fide* impression that he was only getting back the possession of his own property, there is no *animus furandi*, and I am of opinion that the prosecution must fail.

Verdict—Not Guilty.

Maclean, for the prosecution.

[Attornies—Bloxsome & Co.]

OXFORD SUMMER CIRCUIT.

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BEFORE MR. JUSTICE GASELEE & MR. BARON VAUGHAN.

BERKSHIRE ASSIZES.

BEFORE MR. BARON VAUGHAN.

July 14th.

REX v. HENRY HEDGES.

In an indictment for putting off counterfeit money at a lower rate than its de-

INDICTMENT on the stat. 8 & 9 W. 3, c. 26, s. 6(a), for feloniously putting off and paying to one Abraham

nomination imported, it was alleged that the prisoner put off a counterfeit sovereign and three counterfeit shillings, "for the sum of five shillings." The proof was, that the prisoner said he would let the witness have a bad sovereign at 4s., and three bad shillings at 1s.; and the witness paid for them with two good half-crowns:—Held, that this proof supported the allegation.

(a) By the stat. 8 & 9 W. 3, c. 26, s. 6, it is enacted, that if any person or persons shall take, receive, pay, or put off, any counterfeit milled money, or any milled money whatsoever unlawfully diminished, and not cut in pieces, at or for a lower rate or value than the same by its denomination doth or shall import or was coined or counterfeited for, that then all and every such per-

son and persons shall be deemed and adjudged guilty of felony, and being thereof convicted, or attainted according to the order and course of the laws of this realm, shall suffer death as in case of felony."

Under the above enactment this is not a capital offence, because the benefit of clergy is not taken away, which was essential to the making an offence capital in all acts passed before the 7 & 8 Geo.

Levi, a counterfeit sovereign and three counterfeit shillings, at a lower rate and value than their denomination imported.

The indictment charged that the prisoner put off the counterfeit sovereign and three counterfeit shillings, "for the sum of *five shillings*." The witness, Abraham Levi, gave the following evidence: "The prisoner said, I should have a cooter (a bad sovereign) at 4*s.*, and three pegs (bad shillings) at 1*s.*, and on his giving them to me I paid for them with two good half-crowns."

Justice, for the prisoner.—This being a matter of contract it must be proved as laid. That was decided in the case of *Rex v. Joyce (b)*, Carr. Supp. 184. Now, in the present case, it is charged that the prisoner put off the whole of the bad money at five shillings, and the proof is that the witness paid 4*s.* for the bad sovereign, and 1*s.* for the bad silver.

4; but in all acts passed since the commencement of the session of Parliament in 1827, the terms, "suffer death as a felon," are sufficient to create a capital offence.

This offence under the stat. 8 & 9 W. 3, c. 26, is stated as a felony not capital in Arch. C. L. 328, and in 1 Curw. Hawk. p. 44, where the offence is treated of, and the clause of the statute set out, but the words printed in italics, *supra*, are omitted.

As to the punishment of felonies not capital, it is by the stat. 7 & 8 Geo. 4, c. 28, s. 8, enacted, that every person convicted of any felony for which no punishment has been specially provided, shall be liable at the discretion of the Court to be transported for

seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice, publicly or privately whipped, if the Court shall so think fit, in addition to such imprisonment. And by sect. 9, of the same stat. the Court may, in its discretion, superadd hard labour or solitary confinement, in all cases in which imprisonment may be awarded under this act.

(*b*) In that case it was charged, in the indictment, that five counterfeit shillings were put off at two shillings. The proof was that they were put off at half a crown. *Thompson, C. B.* and *Heath J.*, held, that, as this was a contract, it must be proved as laid, and directed an acquittal, MS. (O. B.)

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VAUGHAN, B.—This is all one contract and one transaction. The whole of the bad money was put off at 5s., and we see that it is paid for with two good half-crowns. If the bad money had been put off at a different sum from that which is charged, the case you have cited shews that that would be a fatal objection. But here you have one contract consisting of two items.

Verdict—Guilty.

Jervis, and *Shepherd*, for the prosecution.

Justice, for the prisoner.

[Attornics—*Powell*, and ———.]

July 15th.

REX v. JOHN SMITH.

If two bills of indictment be preferred for the same offence, the one charging it capitally, the other as a misdemeanor, and both be found, the Judge will put the party to his election which he will go upon, and direct an acquittal on the other.

INDICTMENT under the stat. 43 Geo. 3, c. 58, (Lord Ellenborough's act (a),) for cutting George Taylor with intent to murder him. There was another indictment against the prisoner, charging this same offence as a common assault.

VAUGHAN, B.—I much disapprove of the practice of presenting two different indictments for the same offence. The party should consider his case, and know what he ought to indict for, and not prefer two bills at once, and take the chance of getting a conviction upon one of them. I shall hold him to elect which he will go upon, and I shall direct an acquittal upon the other.

The prosecutor elected to go upon the indictment for the capital offence, and an acquittal was therefore taken on the bill for the misdemeanor. The trial proceeded on

(a) This act is repealed by the stat. 9 Geo. 4, c. 31, but its provisions, as to this offence, are in substance re-enacted in sections

11 and 12 of the stat. 9 Geo. 4, c. 31, with the addition of the word *wound* to the words *stab or cut*.

the capital charge, and the prisoner was acquitted of that charge upon the merits.

Rigby, for the prosecution.

[Attorney—*Roberts*.]

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v.
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REX v. FLOWER.

INDICTMENT for larceny in stealing two pigs, with a second count charging the prisoner with a substantive felony in receiving the pigs, knowing them to be stolen.

C. Phillips, for the prisoner, submitted, that as these were distinct felonies, the prosecutor ought to elect which he would go upon.

VAUGHAN, B.—I think the prosecutor must elect which of these counts he will go upon, and abandon the other (*a*).

Justice, for the prosecution, elected to go upon the count for receiving.

Verdict—Guilty.

Justice, for the prosecution.

C. Phillips, for the prisoner.

[Attornies— ———, and ———.]

Aug. 1828.

If an indictment contain two counts, one charging the offence as a larceny, the other as a receiving, the Judge will put the prosecutor to elect which he will go upon.

(*a*) In the case of *Young v. The King*, (in error), 3 T. R. 106, *Buller, J.* says, "In misdemeanors, it is no objection to an indictment that it contains several charges. The case of felonies admits of a different consideration. If it appear, before the defendant has pleaded, or the Jury are charged, that he is to be tried for separate offences, it has been the practice of the Judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the Jury; but these are only matters of prudence and discretion. If the Judge who tries the prisoner does not discover it

in time, I think he may put the prosecutor to make his election on which charge he will proceed. But if the case has gone to the length of a verdict, it is no objection in arrest of judgment." In the case of *Rex v. Dunn*, Carr. Supp. 82, it was held by the twelve Judges, that in cases where it is *probable* that all the goods alleged to have been stolen were not stolen at one time, but still it be *possible* that they might be so, the Judge at the trial should not put the prosecutor to elect to go upon the stealing of some particular article or articles.

1828.

July 15th.

REX v. MARIA HUGGINS. *

An inquisition for murder, charging that the prisoner upon a new-born female child did make an assault, and the said new-born child, with "both her hands, in a certain piece of flannel, of no value, then and there feloniously, wilfully, and of her malice aforethought, did wrap up and fold, by means of which said wrapping up and folding the said new-born female child in the piece of flannel aforesaid, she the said new-born female child was then and there suffocated and smothered, of which said suffocation," &c. she instantly died; is good, although the inquisition does not go on to allege that the flannel was folded over the child's mouth, or inclosed the head, or the like.

It is no objection to the laying of the time in a corner's inquisition, that the offence is stated to have been committed on the "26th day June," omitting the word "of."

INQUISITION for the wilful murder of a female bastard child. The inquisition charged, that, on the "26th day June," &c., the prisoner on the said child "did make an assault; and that the said M. H. her the said new-born child, with both her hands, in a certain piece of flannel, of no value, then and there feloniously, wilfully, and of her malice aforethought, did wrap up and fold, by means of which said wrapping up and folding the said new-born female bastard child in the piece of flannel aforesaid, she the said new-born female child was then and there suffocated and smothered; of which said suffocation and smothering she the said new-born female child then and there instantly died; and so the jurors aforesaid," &c.

Carrington, for the prisoner.—I submit that this inquisition must be quashed, on three grounds: *First*, because the time is imperfectly laid, it being stated as the "26th day June," instead of the "26th day of June." *Secondly*, because the offence itself is not sufficiently charged, as the indictment does not impute to the prisoner that she did any thing sufficient to cause death. In every indictment for murder, the size and situation of the wound are to be stated, to shew that the injury was of such a nature as to be the cause of the death, unless where a limb has been cut off, which is considered to be of itself sufficient to cause death. Now here, the whole that is charged against the prisoner is, that she wrapped the child in flannel, which is not only a harmless, but almost a necessary act for its preservation; and the allegation is defective in not going on to charge that she wrapped the flannel tightly over the child's mouth, or inclosed its head in it, or the like. *Thirdly*, one of the names signed to the inquisition differs from the name of any of the jurors stated in the caption.

VAUGHAN, B.—I think there is nothing in the first objection as to the laying of the time. I cannot read “the 26th day June” to mean any thing but the 26th day of June (a). As to the manner of charging the offence, I also am of opinion that that is sufficient. When it is charged that the prisoner “feloniously, wilfully, and of her malice aforethought,” did wrap up and fold the child in flannel, whereby the child was suffocated, I must understand that to mean a wilful suffocation by those means, which is exactly what is intended to be charged on this inquisition. With respect to the third objection, I am clearly of opinion that that is fatal; and on that ground I shall quash the inquisition.

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Inquisition quashed.

Justice, for the prosecution.

Carrington, for the prisoner.

[Attornies—*Slade*, and *Frankun*.]

(a) In the case of *Rex v. Scott*, Russ. & Ry. C. C. R. 415, where an indictment for an offence alleged to be committed 1 Geo. 4, concluded against the peace of the *late* king, the word ‘late’ was rejected as surplusage. So in the case of *Rex v. Gill*, Id. 431, where, in a case tried on the Summer Circuit, 1 Geo. 4, the indictment charged, that the prisoner committed the offence on the 20th of July, “in the fourth

year of the reign of King George the Fourth;” it was held, that the words “*the fourth year of*” might be rejected as surplusage. These cases are, however, of less importance, as, by the stat. 7 Geo. 4, c. 64, s. 20, objections as to the laying of the time of the offence in indictments can only be taken advantage of by demurrer. But that statute does not apply to coroners’ inquisitions.

1828.

July 16th.

REX v. BRINKLETT and Others.

An indictment for manslaughter described the deceased, who was a Peer of Ireland, as "H. S., Baron M. of C., in the county of R., in that part of the United Kingdom called Ireland." It was proved that H. was his christian name, S. his family surname, and Baron M. &c., his title:—Held, no variance, and that the Court was not bound to construe H. S. to be one christian name.

MANSLAUGHTER.—The indictment described the deceased as "Henry Sandford, Baron Mount Sandford, of Castlereagh, in the county of Roscommon, in that part of the United Kingdom called Ireland."

Mr. Gascoigne, who was called to prove the name of the deceased, said, that Lord Mount Sandford's christian name was Henry; that his family surname was Sandford; and his title Baron Mount Sandford.

Curwood, and *Shepherd*, for the prisoners.—Upon the face of this indictment, the name Henry Sandford must be taken to be one Christian name; because, since the union with Ireland, Peers of Ireland are Peers of the United Kingdom, except for the purposes of sitting in Parliament and voting. A peer has no surname, that being merged in his title; and therefore Henry Sandford must be taken to be laid as one christian name, which is not proved.

Talfourd, and *Secker*, *contra*.—The name of the deceased must be inserted correctly in an indictment for murder or manslaughter, to shew with certainty what person was killed. Now here the deceased is described with the greatest particularity. Again, this indictment has nothing vicious on the face of it, *non constat* that what is stated there is not the right name of the deceased. It therefore becomes a mere question of variance; and with respect to that, Mr. Gascoigne proves, that the christian name and title of the deceased are correctly stated, and that the family surname is also correctly stated, although its introduction may be superfluous. But still, if it is proved that every thing is stated correctly, the mere superfluous introduction of the peer's surname will not vitiate the indictment.

VAUGHAN, B.—There is no error on the face of the indictment, and the whole question is, whether the evidence of Mr. Gascoigne proves that there is a variance. Now, I think it does not; we must take what he says all together. However, if, on consideration, I should think the objection valid, I will reserve the point.

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Verdict—Guilty.

Talfourd, and *Secker*, for the prosecution.

Curwood, and *Shepherd*, for the prisoners.

[Attornies—*Fowles*, Junr., and *Watmore*.]

IN the course of the Circuit, the Learned Baron stated that he had re-considered the case, and was clearly of opinion that there was no variance, and therefore he should not reserve the point.

In the commission for the trial of Lord Byron, for the murder of Mr. Chaworth, in 1765, his Lordship was stiled *William Byron*, Baron Byron of Rochdale, and was so described in the indictment. His Lordship was an English peer, the creation of his title being in the year 1643. However, it can hardly be supposed, that his Lordship's christian name was *William Byron*, because allthrough the trial he was addressed by the Lord High Steward, as *William*

Lord Byron, and so stiled in all the proclamations &c., during the trial; and at the conclusion of it, the question put was, "what says your Lordship? Is *William* Lord Byron, guilty," &c. 19 State Tr. 1177.

Lord Ferrers was indicted (Id. 85) as Lawrence Earl Ferrers, Vicount Tamworth; and there can be no doubt that the *usual* way of describing a peer is by his christian name and his title, omitting his family surname.

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OXFORD ASSIZES.

BEFORE MR. JUSTICE GASELEE.

July 18th.

REX v. COMPTON and Others.

On an indictment for burglary, by breaking into a house in the night-time, and stealing to the value of 5*l.* or more, the prisoner may be convicted of burglary, or of house-breaking under the stat. 7 & 8 Geo. 4, c. 29, s. 12, or of stealing in a dwelling-house to the value of 5*l.*

BURGLARY. The indictment charged the prisoners with breaking into the house in the night time, and stealing goods to more than the value of 20*l.*

GASELEE, J.—Upon this indictment, if the Jury are satisfied, that there was a breaking in the night time with intent to steal, they may convict these prisoners of burglary; but if they should think the breaking was not in the night time, but that there was a breaking and goods stolen of any value, they may convict the prisoners of house breaking, under the stat. 7 & 8 Geo. 4, c. 29, s. 12; or if they should think that the evidence of the breaking is not sufficient, they may still, upon this indictment, convict the prisoners of stealing in a dwelling-house, to the value of five pounds.

Verdict—Guilty of burglary.

Curwood for the prosecution.

Churchill, and *Cooper*, for the respective prisoners.

[Attornies—*B. Aplin*, for the prosecution; and *Cecil* and *Tomas*, for the respective prisoners.]

1828.

REX v. MARY HANKS.

July 18th.

PERJURY, in swearing falsely before Mr. Crews Dudley, an arbitrator, appointed under an order of Lord *Tenterden*. It appeared, that an action depending in the Court of King's Bench was referred by an order of Lord *Tenterden* to Mr. Crews Dudley, and by his Lordship's order it was "further ordered, that the respective witnesses should be sworn before the said Chief Justice, or some other Judge of his Majesty's Court of King's Bench, or before a commissioner duly authorized." Mr. Dudley was a commissioner for taking affidavits in the Court of King's Bench; and he, under this order, swore the present defendant as a witness, before himself, and signed a *jurat*, stating, that she had been so sworn; and he then examined her *visá voce*. On this evidence the perjury was assigned.

A cause was referred by a judge's order to C. D., and by the order it was directed that the witnesses should be sworn before a Judge, "or before a commissioner duly authorized." A witness was sworn before a commissioner for taking affidavits, and examined *visá voce* by the arbitrator:—Held, that a witness so sworn was not indictable for perjury.

Talfourd, for the defendant, objected—That, although Mr. Dudley was a commissioner duly authorized by his commission to take affidavits, yet he had no authority of any kind to administer an oath for any *visá voce* examination; and he further objected, that the order of Lord *Tenterden* conferred no new power of swearing witnesses, but merely allowed the witnesses to be sworn before a commissioner *duly authorized*, which meant, authorized by some other means.

GASELEE, J.—By the statute 29 Car. 2, c. 5, the Courts are empowered to appoint commissioners for taking affidavits; and if this order had empowered a commissioner for taking affidavits to administer this oath, I would have reserved the point, because, whether the Court of King's Bench has any power to authorize their commissioners to take any thing but affidavits, is a question that I should have left them to decide. However, on this order, that

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question does not arise, for the order only allows the witnesses to be sworn before a commissioner *duly authorized*; now, as Mr. Dudley was never authorized to administer an oath for a *vivâ voce* examination, I am of opinion that the defendant must be acquitted.

Verdict—Not Guilty.

Curwood, for the prosecution.

Talfourd, for the defendant.

[Attornies—Price, and H. Taunton.]

By the statute 29 Car. 2, c. 5, it is enacted, that the Lord Chief Justice and Judges of the Court of King's Bench (and also the Judges of the other Courts respectively), shall and may, by one or more commission or commissions, under the seals of these Courts, empower persons in the several shires of England, "to take and receive all and every such affidavit and affidavits, as any person or persons shall be willing and desirous to make before any of the

persons so empowered in or concerning any cause, matter, or thing depending, or hereafter to be depending, or anywise concerning any of the proceedings to be in the said respective Courts, as Masters of Chancery in extraordinary do use to do." And by the latter part of this clause, persons forswearing themselves in such affidavit or affidavits, are made liable to the same penalties as if such affidavit or affidavits had been made and taken in open Court.

WORCESTER CITY ASSIZES.

BEFORE MR. JUSTICE GASELEE.

July 22nd.

REX v. SPENCER.

Indictment for false pretences in passing a note of a bank that had stopped payment as a good note. The prisoner knew that the bank had stopped payment; but it appeared that two only of the partners of the bank had become bankrupt, and that the third had not:—Held, that the prisoner must be acquitted.

FALSE pretence. The indictment stated, that the prisoner "did offer and pay a certain paper writing, partly printed and partly written, purporting to be the promis-

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 }
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sory note of Coleman, Smith, and Morris, for the payment of 1*l.*, as co-partners and bankers trading under the firm of C., S. & M., and did then and there unlawfully and falsely pretend to one Peter Pollard, that the same was a good and available note of the said C., S. & M., whereas, &c. it was not, at the time it was so offered, a good and available note, as he the said F. S. well knew," &c. (a).

It was proved, that the prisoner gave the note to the prosecutor in payment for meat; and another witness proved, that he had told the prisoner that the Leominster bank (from which the note was issued) had stopped payment. It was also shewn, on the part of the prosecution, that the banking-house at Leominster was shut up, and that Messrs. Coleman & Morris had become bankrupts; but it appeared, on the cross-examination, that Mr. Smith, the third partner, had not become bankrupt.

Busby, for the prisoner, objected, that, as one of the partners had not become bankrupt, the note remained an available note as it respected him; and *non constat*, that, if presented to him, it would not have been paid.

GASELEE, J.—On this evidence the prisoner must be acquitted; because, as it appears that the note may ultimately be paid, I cannot say that the prisoner was guilty of a fraud in passing it away.

Verdict—Not Guilty (b).

Godson, for the prosecution.

Busby, for the prisoner.

[Attornies—*Wilson*, and *S. Godson*.]

(a) In the case of *Rex v. Freeth*, Russ. & R. C. C. R. 127, it was held, that the acts and conduct of a party may be sufficient to constitute a false pretence, without any verbal representations of a false nature; and that the fact of

uttering a counterfeit note as a genuine note, is tantamount to a representation that it was so.

(b) For this report, we are indebted to the kindness of one of the counsel in the case.

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July 30th.

REX v. EDWARD HODGSON.

If a prisoner, indicted for embezzlement, does not know the specific acts of embezzlement intended to be charged against him, he should apply to the prosecutor for a particular of the charges; and if it be refused, the Judge will, on motion, supported by proper affidavits, grant an order for such particular to be given, and postpone the trial, if necessary.

Such particular ought, at least, to state the names of the persons from whom the money is alleged to have been received.

It was the duty of a clerk to receive monies daily at N., to enter all such monies so received in a book, and to remit the amount weekly to L. His entries were all correct, and admitted the receipt of all the monies; but he did not remit them to L., as was his duty:—Held, no embezzlement.

EMBEZZLEMENT.—The indictment, (which was framed under the stat. 7 & 8 Geo. 4, c. 29), contained counts for three acts of embezzlement, alleged to have been committed within six months.

The prisoner had been the clerk in the Mail Coach Office at Newcastle-under-Lyme; and, at the time he pleaded to the indictment, an affidavit made by the prisoner was put in, in which, after stating that he had been informed that an indictment for embezzlement had been preferred against him, he added, that he was wholly unacquainted with the particular acts of embezzlement intended to be charged against him; and also that he was advised, and verily believed, that, in order to his defence, it was necessary that he should be furnished with a particular of the specific charges intended to be brought forward.

Curwood, for the prisoner, on this affidavit, moved for an order, directing the prosecutor to furnish a particular of the charges. He argued, that, as the indictment gave the prisoner no knowledge of the time at which the offences were supposed to have been committed, nor of the amount of the money, nor of the persons from whom it was said to have been received; it was wholly impossible that the prisoner could make his defence; because, as a coach-office clerk, he had received many hundred sums of money every day. He relied on the authorities collected in Carr. Supp. (a).

VAUGHAN, B.—I have referred to those passages of the work which you rely upon; and I think that the authorities there cited are very much to the purpose. Have you applied to the prosecutor for the particular you want?

Curwood.—No, my Lord; but notice has been given of this motion.

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VAUGHAN, B.—I think you ought to apply to the other side to furnish you with a particular; and if they refuse it, I will grant an order. The clause of the stat. 7 & 8 Geo. 4, c. 29, respecting the framing of indictments for embezzlement, causes the greatest hardship to prisoners. What information does the indictment convey to such a man as this? As a clerk in a coach-office, he must have received money from many hundred persons. I should therefore recommend the prisoner's attorney to apply to the prosecutor for a particular; and I think that the prosecutor ought at least to give the names of the persons from whom the sums of money are alleged to have been received; and if the necessary information is refused, I will, on an affidavit of that fact, grant an order, and put off the trial.

R. V. Richards, for the prosecution.—The prosecutor will furnish a particular, if your Lordship thinks he ought.

VAUGHAN, B.—Without laying down any express rule, I certainly do say that the prosecutor, in a case of embezzlement, ought, in justice to the prisoner, to give him much more information than the indictment contains (a).

R. V. Richards, for the prosecution, then furnished a particular; with which *Curwood*, for the prisoner, expressed himself quite satisfied.

The facts of the case were as follow:—The prosecutor, Mr. Scott, to whom the prisoner had acted as clerk, was one of the proprietors of the London and Li-

(a) For the clause of the stat. 7 & 8 Geo. 4, c. 29, respecting the framing of indictments for embezzlement, and the authorities on which the application for a particular was founded, see Carr. Supp. 3d Edit. p. 319—324.

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Liverpool Mail; and it was the duty of the prisoner to receive money for passengers and parcels, to enter the sums in a book, and to remit the amount weekly to Liverpool. In this book the prisoner had made the following entries—

	£	s.	d.
" 13 June	1	6	6
15 June	1	17	0
20 June	2	18	0"

as of sums received by him; but it was admitted that the prisoner had made no false entry, and that he had charged himself in the books with all monies that he had received; but it was imputed to him, that, having received these three sums, he had not sent them to Liverpool, as he ought to have done.

VAUGHAN, B.—This is no embezzlement: it is only a default of payment. If the prisoner regularly admits the receipt of the money, the mere fact of not paying it over is not a felony. It is but matter of account (*b*).

Verdict—Not Guilty.

R. V. Richards for the prosecution.

Curwood, for the prisoner.

[Attornies—*Willm*, and *Flint*.]

(*b*) In the case of *Res v. Hebb*, 2 Russ. 1242, it appeared by the books of a clerk that he had received much more than he had paid away; and from this the prosecutors (his masters) wished it to be inferred that he must have embezzled some particular note or piece of money; but *Garrow*, B., held, that this was not enough, and that it was necessary to prove that some distinct act of embezzlement had been committed.

GLOUCESTER ASSIZES.

BEFORE MR. BARON VAUGHAN.

REX v. DANIEL CORDY and Another.

Aug. 18th.

INDICTMENT, for cutting, under the statute 9 Geo. 4, c. 31. The *first* count laid the offence to be with intent to maim; the *second*, with intent to disfigure and disable; the *third*, with intent to do some grievous bodily harm; and the *fourth* and *fifth* counts, with intent to prevent a lawful apprehension.

Before plea pleaded, *Carrington*, for the prisoners, stated, that the fourth and fifth counts would be bad on demurrer, as they did not sufficiently allege the cause of the apprehension (a); and he mentioned this, because these defects were such as could not be taken advantage of, either in arrest of judgment or as matter of error; as, even without the disputable allegations, these counts charged the offence in the words of the statute creating it, which is good under the statute 7 Geo. 4, c. 64, s. 20, except upon demurrer. With respect to the other counts, he admitted that they were free from objection.

VAUGHAN, B.—As there are three counts of the indictment clearly good, I think the best course for the saving of the public time will be to allow the trial to proceed. If the prisoners are acquitted on the merits, the goodness of these latter counts becomes immaterial; and that will likewise be the case if the prisoners are convicted on any one of the three clearly good counts: however, if

Practice.—It being questionable whether a particular count in an indictment for felony was not bad on demurrer, upon an objection that would be aided by verdict, and this being pointed out to the Judge before plea pleaded—His Lordship, to save the public time, directed the trial to proceed, saying, that if the prisoner should be convicted on evidence, which, in his opinion, was applicable to this count only, he would consider it as demurred to, and allow the demurrer to be argued, putting the prisoner in the same situation as if the count had been demurred to in the first instance.

(a) An indictment for cutting, with intent to resist a lawful apprehension, ought to state the cause of the apprehension, so as to shew that the apprehension was a lawful one.

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there should be a conviction, and I should think that the evidence applied to the fourth and fifth counts only, I will consider them as demurred to, and let you in to argue the goodness of the allegations; and if they shall turn out to be not good, I will put the prisoners in the same situation as if these counts had been demurred to, and the demurrer argued in the first instance.

The prisoners were acquitted on the merits (a).

Justice, for the prosecution.

Carrington, for the prisoners.

[Attornies—*Blarssome*, *W. & B.*, and ———.]

(a) The course of proceeding suggested by the learned Baron tends much to the saving of the public time, because, on the trial of an indictment, containing several clearly good counts, and only one or two disputable ones, it would rarely happen that the prisoner should be convicted on the disputable counts only, and acquitted on all the others. However, it being enacted by the statute 7 Geo. 4, c. 64, s. 21, "That, where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute," it behoves the prisoner's counsel, in all cases within the operation of this enactment, not to let a verdict pass against his client on

a count having any defect which would be aided by verdict. This can only be prevented by a demurrer to such count; and though, it is true, that in most cases the verdict *might* not be found on that count only; yet, we believe that a case has occurred on one of the circuits, where a prisoner was convicted only on particular counts of an indictment, and that these counts (originally not good) were aided by this enactment.

As to whether a judgment on a demurrer to an indictment for felony is *conclusive* against the prisoner, or whether it is, *that he should answer over*, has been doubted: however, the better opinion certainly is, that, in cases of *felony*, the prisoner can only have final judgment against him after a conviction upon the merits; and that the prisoner is not precluded from disputing the charge, merely because a plea of *autrefois acquit*, or *convict*, a plea of pardon, demurres,

or other matter, beside the justice of the case, may have been adjudged against him. Indeed this is clearly so in the case of a plea of *autrefois acquit* being found

against the prisoner. On this subject see 2 Curw. Hawk. c. 31; 1 Stark. C. L. 315, and 4 Bl. Com. ch. 26.

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v.
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MORRIS v. DAVIES, and HARRIET, his Wife.

THIS was a third trial of the issue, whether the plaintiff was the legitimate son of William and Mary Morris (the second trial of which is reported, *ante*, p. 215). Lord *Lyndhurst*, C., directed a third trial, on the ground, that the two former verdicts were contrary to each other, and the last of them unsatisfactory to the learned Baron before whom the case was tried, and also because some fresh evidence had been adduced at the second trial.

The facts were proved on both sides precisely as stated, *ante*, p. 216, except that, as the witness, Mary Evans, was not called, what is there stated as the effect of her testimony was not in proof at the present trial.

GASELEE, J. (in summing up)—The question to be determined here is, whether Mr. and Mrs. Morris were in such a situation that sexual intercourse *might* have taken place between them, at such a time that Mr. Morris *could*, by the course of nature, have been the father of the plaintiff. For, if such sexual intercourse *might* have taken place, the law presumes that it *did* take place, unless the facts proved on the other side are such as satisfy you, beyond all doubt, that no such sexual intercourse did in fact take place. In the case of *Head v. Head* (a), the Lord Chancellor and Vice Chancellor seem to have entertained some doubt, whether, after evidence was given,

Aug. 21st.

If husband and wife are in such a situation that sexual intercourse *might* have taken place, the law presumes that it did take place, unless such facts are proved as satisfy the Jury *beyond all doubt* that no such intercourse did take place; and, therefore, unless such facts are proved, a child born of the wife is legitimate, if the husband and wife were in such a situation that sexual intercourse *might* have taken place between them, at a time, when, by the course of nature, the husband could have been the father of the child.

If, after the trial of an issue out of Chancery, the Jury are locked up for many hours, and are not likely to agree when the Judge is about to leave the town

—The Judge will discharge them of his own authority, if the parties decline consenting to their discharge; but if a Jury be under such circumstances, in a cause depending between party and party, *semble*, that the Judge would order that the Jury should follow him in a cart.

(a) Sim. & Stu. 160, and 1 Turn. 138.

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shewing an opportunity of sexual intercourse, any evidence could be received on the other side, which did not go to shew a physical impossibility on the part of the husband; however, in that case, the precise point did not arise. I much regret that I have not now the assistance of my learned Brother *Vaughan* (a), before whom this cause was so ably tried on two former occasions; however, I will read you the opinion of my learned Brother, delivered by him at the last trial, as I have reason to know that that opinion was delivered by him after much consideration, and was satisfactory to the Profession. [Here his Lordship read the whole of the opinion of *Vaughan*, B. from these Reports (b)]. Such was the opinion of my learned Brother, after much consideration, and I have stated it to you as containing the rules, which, according to the laws of England, ought to govern you in considering of the legitimacy of the plaintiff.

The Jury retired at about two o'clock on Saturday, August 23, and were locked up all night; and this being *the last case to be tried*, Mr. Justice *Gaselee*, at about nine o'clock in the morning of Sunday, August 24, sent for the Jury to his lodgings, and asked them if they were likely to agree on their verdict. The foreman (Captain Lloyd, R. N.) stated, that eleven of the jurors had agreed that the verdict should be for the plaintiff, but that the twelfth would not concur with them, and could not assign any reason for his refusal. Captain Lloyd also stated, that the eleven jurors were satisfied, by the evidence, that there had been opportunity for the sexual intercourse.

GASELEE, J.—As matter of form, I will ask the parties whether they consent to the Jury being discharged without giving any verdict.

(a) Mr. Baron *Vaughan* left Gloucester several days before.

(b) *Ante*, p. 217.

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Curwood, for the plaintiff (a).—If this were an ordinary case of an issue joined in a Court of law, I should feel it a duty to relieve eleven gentlemen so circumstanced, by consenting to their discharge; but as this is an issue directed by the Lord Chancellor for the information of his conscience, I do not consider that I have any power to give such consent, and I cannot take the responsibility.

GASELEE, J.—Then, gentlemen, I shall take a responsibility on myself, on the ground that this is an issue out of Chancery. I might, in an ordinary case, take you in a cart to the bounds of the county, and there discharge you (b); but I think it right to state to you the grounds of my discharging you now. This issue is directed to inform the conscience of the Lord Chancellor, and he may send it down again for trial after repeated verdicts, if those verdicts are not agreeable to his sense of justice, or he may even decree contrary to a verdict, if he thinks proper. Indeed, it will be for the Lord Chancellor to consider, whether the opinion of eleven jurors, so expressed, may not be as satisfactory to him as a formal verdict.

Captain Lloyd.—My Lord, we request that the Lord Chancellor may be informed that eleven of us were unanimous in favour of the plaintiff, without leaving the jury-box.

GASELEE, J.—I shall now take upon myself the responsibility of discharging you, and you are, therefore, discharged without giving any verdict.

The Jury then separated (c)

(a) All the defendant's counsel had left the town.

(b) Gloucestershire is the last county in the Oxford Circuit.

(c) Lord Hale says (H. P. C. 297, n.), that in very ancient times it was not necessary in civil cases

that all the twelve jurors should agree; and that in case of a difference among the Jury, the method was, to separate one part from the other, and then to examine each of them as to the reasons of their differing in opinion; and if, after

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Russell, Serjt., Curwood, and Whateley, for the plaintiff.
Taunton, Campbell, Peake, Serjt., and R. V. Richards,
for the defendants.

[Attornies—*Watson & Harper, and Chadborne.*]

such examinations, both sides persisted in their former opinions, the Court caused both verdicts to be fully and distinctly recorded, and then judgment was given *ex dicto majoris partis juratorum*. And he cites the cases of the Abbot of *Kirkstede v. Edmund De Eyne-court*, 56 Hen. 3, and *Tristram v. Siminel*, 14 Edw. 1, where this practice was adopted; but *Bracton*, who wrote *temp. Hen. 3*, in treating of the assize of *novel disseisin*, says (lib. 4, fo. 185), that when the Jury cannot agree "*affortietur assisa*," i. e. the Jury shall be increased by the calling of additional jurors. However, the necessity of the petit Jury being unanimous has been long established. In the *Mirror*, c. 4, s. 24, it is said, that if the jurors in petit assizes be of divers opinions, they are not, therefore, to be threatened or imprisoned. And in 41 *Assiz.* pl. 11, the Jury were sworn to try the assize, and as one of them would not agree with the other eleven, they were remanded all that day and the next without eating or drinking; and then the Judges demanded of the twelfth Juror, whether he would accord with his companions. He said he never would, and that he would rather die in prison. The verdict of the eleven was then taken, and the twelfth sent to prison. But this being held by all

the Justices to be no verdict, a new *venire facias* issued, and the juror was released from prison; and "the Justices said, that they ought to have carried the assize in carts till they were agreed."

In Bro. Abr. tit. Verdict, pl. 49, it is laid down, that a "*verdict de xi. ou le xii. ne voet agree est void verdict; et per curiam les Justices duissent aver eux carry in cartes ove eux, tang. ils sera agree.*" And Mr. Justice Blackstone says (3 Com. ch. 23), "If the Jurors do not agree in their verdict before the Judges are about to leave the town, though they are not to be threatened or imprisoned, the Judges are not bound to wait for them, but may carry them round the Circuit from town to town in a cart." It, therefore, appears that the Jury are not to be discharged at the borders of the county, except in cases which occur in the last county of the Circuit; and that, in all other cases, they are to follow the Judges from county to county, till they shall be agreed. And the reason of their being discharged at the boundary of the last county in cases of this kind, which have arisen in that county, seems to be, that the authority of the Judge as a Judge at Nisi Prius is then at an end.

On the Circuit, the Judges have one commission of Assize and Nisi Prius, and one commission of

Oyer and Terminer for their whole Circuit, but their commissions of gaol delivery are separate for each county.

The authorities above cited relate to civil causes: with respect to criminal cases, it is laid down in *Res v. Ledingham*, 1 Vent. 97, that, "in cases of life and member, if the Jury cannot agree before the Judges depart, they are to be carried in carts after them; so they may give their verdict out of the county." With respect to the discharging of a Jury who cannot agree in a criminal case, Lord Coke says (3 Inst. 110), "If any person be indicted of treason or of felony or larceny, and plead not guilty, and thereupon a Jury is returned and sworn, their verdict must be heard, and they cannot be discharged." Mr. Serjeant Hawkins says (2 Curw. Hawk. 619), that "it seems to have been an ancient uncontroverted rule, that a Jury sworn and charged in a capital case cannot be discharged without the prisoner's consent, till they have given a verdict; and

notwithstanding some authorities to the contrary in the reign of King Charles the Second, this hath been holden for clear law, both in the reign of King James the Second and since the Revolution." However, in Sir John Wedderburn's case, Fost. 23, (where the law on this subject is very much discussed), the Judges agreed, "that, admitting the rule laid down by Lord Coke, to be a good general rule, yet it cannot be *universally* binding, nor is it easy to lay down any rule that will be so." And they said, that "the rule cannot bind in cases where it would be productive of *great hardship or manifest injustice* to the prisoner."

Before leaving this subject, it may be proper to remark, that in the case of *Tristram v. Siminel* (above cited), the whole Jury consisted of only eleven, the verdict of ten being for the plaintiff, and the verdict of the eleventh for the defendant, and judgment was given for the plaintiff, "*quia dicto majoris partis juratorum standum est.*"

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COURT OF COMMON PLEAS.

Second Sitting at Westminster, in Easter Term,
1828.

BEFORE LORD CHIEF JUSTICE BEST.

May 7th.

ROBERTS v. HAYWARD.

A party occupied premises, under an agreement for three years, at 45*l.* a-year, which expired at Midsummer, 1826; he did not then go out, nor did his landlord take any steps to compel him, but at the Michaelmas following, gave him notice to quit at Lady-day, 1827, or pay the rent of 50*l.* a-year. He continued in, but refused to pay more than the 45*l.* rent:—Held, that, under the circumstances, he must be taken to have acquiesced with the new proposal, and was bound to pay the rent of 50*l.*

REPLEVIN.—The defendant made cognizance as bailiff of the plaintiff's landlord. The plaintiff pleaded, first, *non tenuit*, second, *riens in arrear*, and third, a tender of 11*l.* 5*s.* The distress was for a quarter's rent, from Lady-day to Midsummer, 1827, and the principal question in the cause was, whether the rent, which the plaintiff was to pay for that quarter, was to be at the rate of 45*l.* or 50*l.* a-year.

The agreement under which the premises were originally let was for three years from Midsummer 1823, at 45*l.* a-year, payable quarterly. This expired at Midsummer 1826. The plaintiff did not quit the premises at that time, and the landlord did not then take any steps to compel him; but on the 29th of September, 1826, he served him with the following notice:—

“ I hereby give you notice to quit the house and fixtures, now in your occupation, at Lady-day next, *viz.* 1827, or in default thereof to pay rent for the house at 50*l.* a-year from and after that day; and if you continue to occupy after that day, you will be considered by me as agreeing to pay that rent.”

Wilde, Serjt., for the defendant, contended, that, under the notice, the plaintiff was bound to pay the rent of 50*l.*; because, as the agreement had expired, he was not in as a yearly tenant, and therefore the landlord might require

him either to quit possession at once, or, if he continued in, to pay an increased rent.

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Spankie, Serjt., for the plaintiff, contended, that a fresh year of the tenancy commenced at Midsummer, 1826, which must be taken to be on the same terms as those of the old agreement; and that such fresh year having so commenced, the landlord was not in a condition to put any other terms upon the plaintiff, or to turn him out before the expiration of it. The plaintiff could not be treated both as trespasser and tenant.

BEST, C. J.—The tenancy under the agreement expired at Midsummer, 1826. Immediately after that time, the plaintiff was a trespasser; but the landlord was not obliged to treat him as such, but might make proposals to him, to renew the relation of landlord and tenant between them. This he did, and the plaintiff did not say, I will go out directly. His silence on the subject is tantamount to his saying, I will continue in on the terms of your proposal. I am of opinion, that, under the circumstances, the distress was regular. I think the landlord had a right to make any terms he pleased for the time subsequent to Lady-day, 1827, and, if the plaintiff would not accept them, to turn him out of possession.

The tender of 11*l.* 5*s.* being a quarter's rent, at 45*l.* a-year, having been proved, the defendant had a verdict on the first and second pleas, and the plaintiff on the third.

Spankie, Serjt., and *Lee*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*Nicol*, and *Partington*.]

IN the course of the Term, *Spankie*, Serjt., moved for a

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new trial, but the Court were of opinion that the decision at *Nisi Prius* was correct, and refused to grant a rule.

Adjourned Sittings at Westminster, after Easter Term, 1828.

BEFORE LORD CHIEF JUSTICE BEST.

May 23rd.

PULLEN v. WHITE.

If certain parts of a book are used to refresh the memory of a witness for the plaintiff, and the defendant's counsel, in his address to the Jury, observes upon the general state of the book, and refers to other parts of it, such observations do not give the plaintiff's counsel the right of reply.

ASSUMPSIT.—A ledger and cash-book had been referred to, for the purpose of refreshing the memory of one of the plaintiff's witnesses, and particular parts of them only were used in the plaintiff's case.

Wilde, Serjt., for the defendant, in addressing the Jury, observed upon the general state of the books, and the mode in which the accounts were kept, and referred to other parts besides those which were used by the plaintiff's witness.

Andrews, Serjt., rose to reply.

Wilde, Serjt., objected.

Andrews, Serjt., submitted, that if in the plaintiff's case only a part of a book was made use of, and the other side referred to other parts, it entitled the plaintiff's counsel to a reply.

BEST, C. J.—I am of opinion that you have not the right of reply. The known rule is decidedly against you. Whether this is to form an exception, is the only question that is arguable; and I do not think there is much in that.

Andrews, Serjt., and Platt, for the plaintiff.

Wilde, Serjt., and Comyn, for the defendant.

[Attornies—*Price, and Fuller & S.*]

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See the cases of *Dowling v. Fini- Loyd v. Freshfield, ante, Vol. 2, p.*
gan, ante, Vol. 1, p. 587; and 325.

DUFFILL v. SPOTTISWOODE, Esq. and Others.

May 23rd.

THE *first* count in the declaration stated, that the plaintiff was the owner and proprietor of divers goods and chattels, to wit, &c., which said goods had been let to hire by the plaintiff to one Thomas Lofting, for a certain term then to come and unexpired, and that the same were then in the possession of the said Thomas Lofting under and by virtue of the said letting; yet the defendants, intending to injure, &c. the said plaintiff, in his reversionary interest and property in the said goods and chattels, and to deprive him of the benefit and advantage thereof, whilst the said plaintiff so was the owner, &c., and whilst the goods were so let and in the possession, &c., unjustly seized and took the said goods and chattels from and out of the possession of the said Thomas Lofting, and *converted*, and *absolutely disposed thereof*, to their own use.

An action by the owner of goods, let for an unexpired term, against the Sheriff, for taking them under an execution against the party who hired them, is not maintainable, if it appear that the Sheriff has not sold. And it is in such case the duty of the party letting to give notice to the Sheriff, of the limited nature of the hirer's interest.

The *second* count was in trover. Plea—Not Guilty.

The plaintiff was a broker and appraiser, and the defendants were the Sheriff of Middlesex and two of his officers, and the action was brought to recover the value of certain furniture and other articles, which were seized in December, 1827, under a *fi. fa.* against the goods of one Thomas Lofting.

Lofting was called as a witness, and stated, that being desirous of furnishing a lock-up-house in the year 1825, he applied to the plaintiff for the loan of furniture;

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and the plaintiff sent him a quantity, accompanied by an inventory, which expressed the terms upon which it was let. This inventory was offered in evidence to prove the agreement between the plaintiff and Lofting. It was not stamped, nor was it signed by the parties.

Wilde, Serjt., for the defendants, objected to its being read, on account of the want of a stamp.

Taddy, Serjt., and *Thesiger*, for the plaintiff, contended, that an agreement not signed did not require a stamp. They cited *Ramsbottom v. Tunbridge* (a) and *Hawkins v. Warre* (b).

Wilde, Serjt.—*Ramsbottom v. Tunbridge* was not an action on an agreement, it was for use and occupation. There was a perfect parol contract, and a paper collateral to the contract was delivered by the auctioneer to the party. The case of *Hawkins v. Warre* is not like the present; for there the unstamped paper was produced to negative the assertion, that the draft of the lease constituted the final agreement.

BEST, C. J.—I shall not receive the paper, because I am of opinion that it is in this case the evidence of the

(a) 2 M. & S. 434. That case decided, that a written paper, delivered by the auctioneer to the bidder, to whom lands were let by auction, containing a description of the property, the term, and the rent, &c. but not signed by any one, was not such a minute of the agreement as was required to be stamped by the 48 Geo. 3, c. 149, nor such a writing as would exclude parol evidence.

(b) 5 D. & R. 512. In that case a witness had deposed, that the settled draft lease was the final agreement of the parties, for one of whom he acted as agent; and it was held, that an unstamped memorandum, written afterwards by him, but not signed by any body, was admissible to shew that the settled draft was not the final agreement.

contract, and requires a stamp, although it is not signed by the parties. I think that if goods are delivered, accompanied by a written paper, that paper must be produced in evidence, otherwise it is impossible to know on what terms the party holds them. I consider this case as distinguishable from *Ramsbottom v. Tunbridge*, because, in that case the paper mentioned was only notice to the party, and not a paper delivered over as this was, accompanying goods, and expressing the terms upon which those goods were parted with.

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In addition to the goods which had been let by the plaintiff to Lofting, in 1825, there were others which Lofting had himself purchased and transferred to the plaintiff in March, 1827, in consideration of 91*l.*, part of which sum had been previously lent. These goods were also allowed to remain in Lofting's possession by the plaintiff, under a written agreement, by which Lofting was to pay 9*s.* a-week for the hire. Both the agreements were stamped during the continuance of the cause. It appeared that, the day after the seizure, the plaintiff gave notice to the Sheriff, that "the whole of the goods" were his "sole property," and threatened an action unless the man in possession was immediately withdrawn.

Wilde, Serjt., for the defendant, contended, that the plaintiff must be nonsuited. The proof necessary to support the first count is, that the defendants sold and converted the goods to their own use. The letting averred is for an unexpired term; and if the allegation of the sale had not been made, the declaration would have disclosed no cause of action. If the allegation had been merely of the letting and seizure, the declaration would have been demurrable. With respect to the count in trover, the case of *Gordon v. Harper* (a), decides that trover cannot be brought by a landlord against the Sheriff, for

(a) 7 Term Rep. 9.

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taking in execution furniture which has been let with a house; because, during the existence of the lease, he has not the right of possession which is necessary to support the action. Again, where a person against whom an execution issues, has a limited interest in goods taken by the Sheriff and not the general property, if the owner claims the goods without giving notice of the limited interest, he cannot maintain an action for them. The case of *Dean v. Whittaker* (a), is an authority to shew that, in this case, the plaintiff ought to be called.

Barstow, on the same side.—There is no place limited for the using of the goods. It is a general letting, and the plaintiff did not give any notice that he had determined the limited interest. In the case of *Dean v. Whittaker* the pleadings were similar to the present. The mere removal of the goods is no evidence of a conversion; because, for aught that appears, Lofting himself might have lawfully removed them from one place to another under the letting to him.

Taddy, Serjt., and *Thesiger*, for the plaintiff.—The question is, whether the Sheriff has not seized the goods and carried them away. The carrying away is evidence of conversion. In *Dean v. Whittaker*, the Sheriff had not sold the goods, and the landlord obtained them from him on payment of the sum indorsed upon the writ; but in our case the Sheriff has carried them away, and it does not appear that he has not sold them.

(a) 1 Carr. & P. 347. That case, which was decided at Nisi Prius by Lord Tenterden, and was afterwards moved in the Court above, does not appear to have been mentioned in any of the Term Reports. It was an action on the case, for taking in execution goods which had been let on hire. And it decides two points; first, that if the sheriff has not sold, the action is not maintainable; and secondly, that it is the duty of the party by whom the goods are let, to give a notice to the sheriff, informing him of the nature of the interest which the tenant has in them.

BEST, C. J.—There is certainly that distinction between the case of *Dean v. Whittaker* and the present, *viz.* that it appears in *Dean v. Whittaker* that the Sheriff had not sold.

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Wilde, Serjt., for the defendants.—Nor has he sold in this case. The goods are now lying in the hands of the sheriff's broker.

BEST, C. J.—If you will call a witness and prove that fact, I shall consider that you have brought yourself within the decision in *Dean v. Whittaker*, and, on the authority of that case, I will direct the plaintiff to be called.

The evidence suggested was then given, and his Lordship directed a

Nonsuit.

Taddy, Serjt., and *Thesiger*, for the plaintiff.

Wilde, Serjt., and *Barstow*, for the defendants.

[Attornies—*Railton & M.*, and *Dickinson & S.*]

IN a case which followed the preceding, the Jury retired to consider of their verdict, and a fresh Jury being called, only five appeared. *Best*, C. J. inquired for the summoning officer, and was informed that he was not in attendance. His Lordship said, that in future he should fine such officer if he did not attend; for it was his duty to be present, as it had been determined by the Twelve Judges that, without his evidence, the Jury could not be fined.

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Adjourned Sittings in London after Easter Term,
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June 4th.

BRANDON v. OLD.

A publican cannot recover for beer furnished to third persons by the order of an individual who has previously become intoxicated by drinking in his house.

ACTION to recover the balance of a publican's bill.

It appeared that the defendant, who was seventy years of age, and had recently come into the possession of some property, was in the frequent habit of drinking at the house of the plaintiff, and was sometimes there on Sundays for six or seven hours together. He was often intoxicated, and would give beer to any one that came to the house. The charge on one day was for eighty-six pints of ale, besides spirits; and on another day, for one hundred and thirty-four pints of ale. Sums had been paid on account at different times, amounting, in the whole, to 32*l*. The balance claimed was 21*l*.

Merewether, Serjt., for the defendant, contended, that if, from the character of the bill, the Jury should be of opinion that the beer charged for was consumed in tippling, the plaintiff could not recover, as such tippling was clearly illegal. There could be no doubt with respect to that which was drunk on the Sundays; and with regard to the spirits, the plaintiff also could not recover for them. He referred to the stat. 3 Geo. 4, c. 77 (a).

BEST, C. J., in summing up, said—Drunkenness is forbidden by the common law; but it has also been forbidden by statute, from the reign of King Charles the Second down to the present time. Publicans are not to allow tippling, and particularly on Sundays. It is clear that this

(a) By that act, publicans are to enter into a recognizance, one condition in which is, that they “shall not wilfully or knowingly permit drunkenness or tippling.”

plaintiff has allowed this old man, the defendant, to drink in this illegal way. It is admitted that 32*l.* has been paid; and if, in your judgment, this is as much as the plaintiff is entitled to, then you will find your verdict for the defendant. If a man, when in his senses, give beer to others, there is no doubt but that he must pay for it. But if he does it when in a state of intoxication, he will not be liable; because the publican, in such case, would be taking advantage of an offence which he himself had been instrumental in producing. If you think the 32*l.* is enough, after deducting the demand for spirits, to pay for all the ale which this publican ought to have allowed this man and his friends to drink, then you will find your verdict for the defendant.

Verdict for the defendant.

Wilde, Serjt., and *Talfourd*, for the plaintiff.

Mercwether, Serjt., for the defendant.

[Attornies—*T. B. Hudson*, and *Slade & J.*]

WRIGHT *v.* TREVEZANT.

June 4th.

ASSUMPSIT to recover a quarter's rent from the 1st of January, to the 1st of April, 1828, under the following instrument:—

“**MEMORANDUM OF AGREEMENT** made between Peter Trevezant, Esq., and Frederick Wright.—Peter Trevezant agrees to pay Frederick Wright the sum of 140*l.* *per annum*, in quarterly payments, for the house, garden, stable, and coach-house, No. 1, Frederick's Place, situate on the rise of Brixton Hill, for the term of seven, fourteen, or twenty-one years, at the option of the tenant at the end of every seven years; the rent to commence from the 1st of January, 1827.”

An agreement “between A. B. and C. D.,” by which “A. B. agrees to pay C. D. 140*l.* a-year, in quarterly payments, for a house, garden, &c., (describing the situation), for the term of seven, fourteen, or twenty-one years, at the option of the tenant, the rent to commence from the 1st January” &c., is a lease, and not merely an agreement for one.

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The paper was dated the 29th December, 1826, and was stamped with a lease stamp. The defendant entered into possession on the 1st January, 1827, and quitted on the 24th of December in that year, having paid a year's rent, and having, on the 11th June, given six months' notice of his intention to quit at the end of the year, which notice the defendant rejected by letter of the 7th of July. The keys were also tendered to the plaintiff, who refused to accept them.

Wilde, Serjt., for the defendant.—The tenancy was determined by the notice given expiring at the end of the year. The paper is an agreement merely, and not a lease. It contains no stipulations of the kind, which every one would expect to find, if the parties had intended it as their final arrangement, and meant that it should operate as a lease. The whole of the agreement is on the part of the tenant. There is no granting on the part of the plaintiff. There are none of those stipulations which are usual in instruments which are intended to regulate the holding. There is no statement as to when possession is to be given: the commencement of the term is only to be ascertained by inference. The affirmative proof is very scanty; and the negative is very abundant. The instrument is all in the future: it is dated the 29th of December; and the rent is to commence from the 1st of January following. There are no words of present demise. The rent is to commence *in futuro*: and the words are more consistent with the period from which rent is to be reserved in the lease, than the period at which possession is to be taken under the agreement. The paper contains nothing more than the minutes of an arrangement to be carried into effect by the execution of a future lease.

Pearse, on the same side.—The cases shew that the intention of the parties, to be collected from the words of

the instrument, ought to be the guide of the Court in deciding upon it. In *Bacon's Abridgment*, title "Lease" (a), it is said, that, "if the most proper and authentic form of words, whereby to describe and pass a present lease for years, is made use of, yet, if upon the whole deed there appears no such intent, but that they are only preparatory and relative to a future lease to be made, the law will rather do violence to the words, than break through the intent of the parties." In the present instrument, there are no words of demise, nor are there any words importing immediate possession. The words "the rent to commence," instead of "the term to commence," merely shew an intention that the rent, when possession should be given, should not exceed a certain sum, and that the agreement should be evidence of the amount of rent, until a lease should be executed. In the case of *Clayton v. Burtenshaw* (b), the words were, as in this case, all on one side. The principle which is to be extracted from the cases is, that the intention of the parties in the words is to be the guide of the Court in construing the nature of the agreement.

Adams, Serjt., for the plaintiff.—The principle now is, that if it appears that the parties contemplated a future lease, it is not a present demise. The question is, whether it is to be gathered from the words that the parties contemplated a future lease. In *Morgan*, on the demise of *Dowding*, v. *Bissell* (c), the words of the agreement were, "Mr. Dowding agrees to let," &c. "at the yearly rent," &c. "and under all usual covenants and agreements as between landlord and tenant," &c.; and the Court inferred from this that the parties contemplated the making of a fresh instrument.

(a) The title is "Leases and terms for years. [K] By what form of words leases may be made."

(b) 7 D. & R. 800; S. C. 5 B. & C. 41.

(c) 3 Taunt. 65.

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BEST, C. J.—Have you any case where a man agrees to take at a certain rent, and the landlord says nothing?

Adams, Serjt.—I have not any decided case of that kind; but what I rely on is, that, in the present case, there is no reference to any future lease intended between the parties. In *Doe v. Groves* (a), there was such reference; but it was still held that the instrument was to be considered as a lease, and that the provision for a future lease to contain further covenants, was for the better security of the parties. The omission of such reference in the present case, shews the full intention of the parties to create a present demise. There is a total absence of all circumstances from which any future instrument is to be presumed. The words “seven, fourteen, or twenty-one years, at the option of the tenant,” shew that the landlord, during those periods, could not get rid of the tenant; and therefore he must be taken to hold for that time.

Patteson, on the same side.—The case of *Clayton v. Burtenshaw* differs from the present. There the supposed landlords were not parties; and there was no mention of the time at which the term was to commence. It is similar to *Dunk v. Hunter* (b), and the rest of the cases in which no term is mentioned. The words “for the term of seven, fourteen, or twenty-one years” amount to a grant of the term. The words “rent to commence,” have the same effect as the words “possession to be taken” would have. A lease for years may commence *in futuro*. It is only necessary that it should appear when possession is to be taken; and it is not necessary that it should be immediate. In the paper in question there is no express reference to any future instrument. We may collect the words, the landlord agrees to let, from the whole of the instrument itself.

(a) 15 East, 244.

(b) 5 B. & A. 322.

Wilde, Serjt., in reply.—The question is, whether it is intended that the party should take a present interest, or whether it is intended that another instrument should be executed. I admit that there are no words of reference to a future instrument; but the intention to have one may be inferred from what is omitted, as well as gathered from what is directly mentioned. There are cases in which the Courts have held a particular paper to be a lease, although that paper stated that a lease was to be subsequently granted: and so, on the other hand, the Court may also infer from the absence of important provisions, that another instrument was contemplated. The paper in this case not only does not contain that which is usual and formal; but it does not contain that which the interests of the parties require. He cited the case of *Colley v. Streeton* (a).

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BEST, C. J.—The only principle applicable to cases of this kind is, that if, in the instrument relied on, there is that which, in point of law, will satisfy the word lease, then it will operate as a lease, unless it was the intention of the parties that another instrument should be executed. No particular form of words is necessary. All that is required is, that the premises to be let should be mentioned, and the rent to be paid, and that the commencement and expiration of the term should also appear; and if there be any uncertainty in any of these particulars, then the instrument will not be a lease. But if we can find all these particulars set out, then it will be a lease, if the parties intended that it should be. I think that, looking at the in-

(a) 3 D. & R. 522. That case decides, that an instrument, whereby A. agrees to let, and B. to take and rent certain premises, "to hold henceforth for a term of thirty-four years," &c. &c. and B. binds himself to keep the premises in tenantable repair during the term, with a further agreement on the part of A. to grant a lease on the like terms, *with usual covenants*, within three months, is not a lease, though it contains words of present contract.

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strument in this case, I can discover all the requisite particulars. It is said, "the rent to commence," and not "the term to commence;" but as it appears that the rent is to be paid "for the term," is not the commencement of the rent expressive of the commencement of the term? If I had seen any stipulation, as in the case of *Colley v. Streeton*, with respect to usual covenants, I should have thought that another paper was to be introduced. It is said that there are no words of demise; but the words "agrees to demise," are not ordinary words of demise; and yet those words have been held to be sufficient, if, from the whole, it appears that a demise was the intention of the parties. We are to consider here, whether there is not that which is equivalent to a demise. If it can be gathered from the whole of the paper, it will be enough, without any specific mention. Where one agrees to pay rent, and the other, by signing the agreement, consents to accept the rent, he agrees to grant that for which the rent is to be paid. By agreeing to accept rent, he agrees to demise the premises. I am of opinion that this paper contains all that is necessary to make a valid lease, and therefore that the plaintiff is entitled to a verdict.

Verdict for the plaintiff.

Adams, Serjt., and *Patteson*, for the plaintiff.

Wilde, Serjt., and *Pearse*, for the defendant.

[Attornies—*Dacie*, and *Broughton & W.*]

1826.

June 5th.

BLANDY v. ALLAN.

TROVER for Madeira wine. Plea—Not Guilty.

The plaintiff was a merchant at Madeira, having a factor in London of the name of Mitchell. In the months of December, 1825, and January, 1826, the plaintiff consigned to Mitchell a quantity of Madeira wine, and Mitchell, being in possession of the dock warrants, on the 16th of January pledged them with the defendant, for the purpose of raising money. At the time of the pledging Mitchell was under acceptances for the plaintiff, upon which the balance was against the plaintiff to the amount of 2050*l.*; but the balance on the cash account was in the plaintiff's favour to the amount of 1400*l.* The plaintiff used to provide for his bills as they became due by previous consignments of wine, and did so provide for the particular bills which were running at the time of the pledging. The defendant was not informed of the particular mode of dealing between the plaintiff and Mitchell. The warrants did not contain any intimation of the plaintiff's being the owner of the wine.

Acceptances of a factor for his principal, which are provided for by the principal before they become due, do not constitute such a demand against the principal as to enable the factor, previous to the 1st of October, 1826, when the 2nd section of the 6 Geo. 4, c. 94, came into operation, to pledge the warrants for goods belonging to the principal, as a security for advances made to himself.

Wilde, Serjt., for the plaintiff.—Neither the act of the 4 Geo. 4, c. 83, nor such part of the 6 Geo. 4, c. 94, as was in operation at the time of the pledging, will be found to apply to this case. The 2d section of the 6 Geo. 4, is the section applicable to such a state of facts as the present; but that did not come into operation till October, 1826, and the transaction in question took place in the January preceding. That statute was passed in the month of July, 1825; and the time between that date and October in the following year, was given to enable merchants abroad to change their correspondents, if they should think it right, in consequence of the alteration in the law. With respect to the state of the account between the plaintiff and Mitchell at the time of the pledging, I admit that if Mitchell had a right to treat acceptances as money, the balance was in his favour. But the

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case of *Fletcher v. Heath* shews that he had no such right (a).

Spankie, Serjt., for the defendant.—The dock warrants state the wine to have been imported by Mitchell, and bonded by him, and the transfer is from Mitchell to the defendant. Those documents, upon the face of them, do not contain any intimation from which the defendant could conclude that the wine did not belong to Mitchell. It appears also that the wine was imported not from Madeira but from Demarara. I rely, first, on the 2d section of the 4 Geo. 4, c. 83, which enables a party to take goods in pledge from the consignee (b). I consider also that the 3d and 5th sections of the 6 Geo. 4, c. 94, are applicable to the case (c). The question depends on the true mean-

(a) 1 M. & Ry. 335. A merchant purchased and paid for East India silks, the warrants for which he sent to his broker, accompanied by bills to nearly their value, drawn upon the broker, which the broker accepted, but did not pay when due. Acceptances of the principal's nearly to the amount of the broker's, were sent to him for the purpose of meeting them. The broker applied them to his own private use, and afterwards pledged the warrants with a third person. It was held in trover by the principal against such third person, that the broker had no lien upon the warrants, which he was in a situation to transfer, and therefore the plaintiff recovered in the action.

(b) That section enacts, in substance, that it shall be lawful for any person to take goods, &c. or the bills of lading for the delivery of them, in deposit or pledge from the consignee; but that in such case such person shall acquire no

further or other right, title, or interest in, upon, or to them, than was possessed, or could or might have been enforced by the consignee at the time of the deposit.

(c) The 3rd section of the 6 Geo. 4, c. 94, provides, in substance, that from and after the passing of the act (viz. 5th July, 1825), in case any person, &c. shall accept and take any such goods, &c. in deposit or pledge, from any such person so entrusted, &c. [as in the 2nd section mentioned,] without such notice as is there mentioned, as a security for any debt or demand due and owing from such person so entrusted, &c. before the time of such deposit, &c. such person so accepting shall acquire no further or other right, &c. than was possessed, or could or might have been enforced by the person, &c. so entrusted, &c. at the time of the deposit; but that such person, &c. shall and may acquire, possess, and enforce such right, title,

ing of the words "at the time of such deposit or pledge as aforesaid." And the question will be, whether Mitchell, on the 16th of January, 1826, was in a situation to claim any lien on the goods of the plaintiff. From the evidence it appears, that, supposing the securities to have run out, and the liabilities also, then the balance on that day would have been in favour of Mitchell. If the pledgee on that day had looked into the state of the account, taking the assets on the one hand and the liabilities on the other, he would have found that the balance was against the plaintiff to the amount of 2050*l*. Under these circumstances I contend, that Mitchell had a lien on the goods, he being under responsibilities for the plaintiff. There was in reality no cash balance; for the 1400*l*. was required to meet the acceptances which were then running. The object of the Legislature is, in transactions between an innocent owner and an innocent pledgee, to favour the pledgee and not the person who has placed such extensive confidence in his agent. At the time of the pledging the wine could not have been taken out of the hands of the factor, without payment of the whole of the balance due to him. The case of *Fletcher v. Heath* was a case of general lien, and not the case of a specific deposit; the right there claimed was on an ultimate balance, and the question did not come within the acts of Parliament. The present case is one of a single deposit, and is as it were a mere insulated transaction.

Patteson, on the same side.—The object of the acts of Parliament was to give the right which we are contending for in this case. What difference would it make supposing the party to be in actual advance of cash? If

or interest as was possessed and might have been enforced by such person so entrusted, &c. The 5th section of the same statute enacts in substance, that from and after the passing of the act, goods, &c. or the documents, &c.

may be taken in pledge of a factor, notwithstanding the receiver knows that the party is a factor; but that in such case no other right shall be acquired than the factor could, at the time of the deposit, have himself enforced.

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the owner were afterwards to pay it off, no doubt the lien would be gone. And there is no difference in principle, between such a case and the present. Any other decision would do away with the effect of the acts altogether. A man might, before the acts, have held as the servant of the factor; and the construction contended for, on the part of the plaintiff, would make the acts themselves confer no other right. What security is there if the pawnee's rights are to fluctuate, according as the rights of the owner and the pawner fluctuate? The judgment of Lord *Tenterden*, in the case of *Fletcher v. Heath*, certainly appears, in parts, to be very strong, but the whole is to be taken *secundum subjectam materiam*. The first part appears to be consonant with the act of Parliament. The second part seems not perfectly consistent with the former, unless it be taken *secundum subjectam materiam*. For there were circumstances in *Fletcher v. Heath*, which shew that Billinge, the broker, never had any lien. In *Manning and Ryland's* report of that case, Lord *Tenterden* is reported to have alluded to the 8th section (a), and to have said, "It follows from that provision, that Billinge, the broker, had no lien upon the warrants at the time when he pledged them, and consequently that the defend-

(a) That section provides, "that nothing in the act contained shall extend or be construed to extend, to subject any person or persons to prosecution for having deposited or pledged any goods, &c. provided the same shall not be made a security for, or subject to, the payment of any greater sum or sums of money, than, at the time of such deposit or pledge, was justly due and owing to such person or persons, from his, her, or their principal or principals: Provided, nevertheless, that the acceptance of bills of exchange by such person or persons, drawn by

or on account of such principal or principals, shall not be considered as constituting any part of such debt so due and owing from such principal or principals, within the true intent and meaning of this act, so as to excuse the consequences of such a deposit or pledge, unless such bills shall be paid when the same shall respectively become due." This section, and the 7th, 9th, and 10th, are repealed by the stat. 7 & 8 Geo. 4, c. 27. However, the 7th and 8th sections are, in substance, re-enacted by the stat. 7 & 8 Geo. 4, c. 29, s. 51.

ants could derive no lien from him, and have no right to detain the warrants as against the plaintiff, the principal."

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BEST, C. J.—It is insisted that this case is governed by the 2nd section of the 4th Geo. 4, and by the 5th section of the 6th Geo. 4. It does not appear to me, that the 2nd section applies to the case at all, because it is there said, that the pledgee shall have no other right than the consignee had and could enforce at the time of the deposit. The effect of that is, that if the owner had borrowed money of the factor, as the factor would have a right to enforce the payment of the money, so the pledgee would have the same right. It is only transferring to the pawnee the same right as was possessed by the factor. Then, as to the 5th section of the 6th Geo. 4, it says, notwithstanding the pledgee has notice that the pledger is a factor, he may accept a deposit; but then it goes on to say, that he shall acquire no other right than was possessed, or could or might have been enforced by the said factor, at the time of such deposit. This goes a shade beyond the former clause, but it gives the pawnee not a right to detain, but only such right as the factor could enforce. I admit that the factor, if he is under acceptances, has a right to detain until those acceptances are discharged, yet he has not any *right to enforce*; and, by right to enforce, I mean, right to call for the payment of money. I think that the 8th section renders it perfectly clear, for it says, that the factor shall not be liable to prosecution for having deposited goods, provided they are not made a security for *the payment of any greater sum of money* than was justly due from the principal at the time of the deposit. This plainly shews, that the liability intended is a pecuniary liability, and that in such case only the factor is protected. The section further provides, that the acceptance of bills of exchange by the factor or agent, on account of his principal, shall not be considered as constituting any part of his debt, so as to excuse the consequences of the pledge, unless they shall be paid when they become due. Under

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these words, whatever may be the situation of the factor, though he is under liabilities to the amount of several thousand pounds, yet if he pledges when there is no cash balance, he is liable to suffer transportation. All this goes clearly to shew, that the former section is confined to money liabilities, and does not extend to acceptances. And any other construction would be absurd, because, though a factor may be under acceptances to-day, yet, to-morrow those acceptances may be met by the principal. And it appears that, in the present case, the factor was actually relieved from his acceptances by his principal. It would be a mischievous construction to say, that a man might pledge goods under such circumstances. It appears to me, that the principle of the decision in *Fletcher v. Heath*, is, that liability under acceptances is not sufficient to entitle a man to pledge. In such case, he has only a right to hold, *nomine pœnæ*, till the liabilities are discharged. I had formed this opinion before I was made acquainted with the case of *Fletcher v. Heath*. I think that the plaintiff is entitled to a verdict.

Verdict for the plaintiff—The warrants were delivered up.

Wilde, Serjt., and *Talfourd*, for the plaintiff.

Spankie, Serjt., and *Patteson*, for the defendant.

[Attornies—*Brooking & S.*, and *Gilbank*.]

CASES

AT

N I S I P R I U S.

PROMOTIONS.

IN Michaelmas Term, 1828, *James Parke*, Esq. was appointed one of the Judges of the Court of King's Bench, *vice* Sir *G. S. Holroyd*, Knight, resigned.

In the following vacation, *Thomas Denman*, Esq. Common Serjeant, received a patent of precedence, and took his seat accordingly.

COURT OF KING'S BENCH.

Sittings in London after Michaelmas Term, 1828.

BEFORE LORD TENTERDEN, C. J.

WILMOT *v.* SMITH.

Dec. 2nd.

GOODS sold. Pleas—*First*, General issue; *Second*, If an attorney send a letter to demand payment, and the debtor make a tender of 4*l.* 10*s.* Replication denying the tender.

tender to him, that is a good tender, unless the attorney disclaims his authority at the time; and, if the attorney be absent, he is bound by the acts of those whom he allows to represent him at his office. Therefore, after such a letter being sent, a tender to the clerk of the attorney at his office (the attorney being absent) is good.

If A. agrees to make an article of certain materials for a stipulated price, but puts in materials of a better kind, he is not at liberty on that account to charge more than the stipulated price, nor can he require the article to be returned, because the buyer will not pay an increased price on account of the better materials.

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This action was brought to recover the sum of 5*l.* 5*s.*, being the price of a printing press, with a wrought iron bottom; and the defence was, that the plaintiff had agreed to furnish a press with a cast iron bottom, at the price of 4*l.* 10*s.* It was admitted, that wrought iron was considered to be the best, but that cast iron would also answer the purpose very well; and it was further proved, that the plaintiff had offered to take the press back again.

To support the plea of tender, it was proved, that the defendant, accompanied by another person, called at the office of the plaintiff's attorney, where they found two of his clerks, and that the defendant then stated, that he came in consequence of a letter from Mr. Platt, demanding 5*l.* 5*s.*; upon which one of the clerks said, that Mr. Platt was not at home, but was expected soon. It further appeared, that, shortly after this, a person came in (who was in fact an articled clerk of Mr. Platt), and that, on his coming in, one of the other clerks said to him: "This is Mr. Smith, come to offer 4*l.* 10*s.*," to which the articled clerk, without stating that he was not Mr. Platt, replied, "I cannot receive less than 5*l.* 5*s.*—Mr. Wilmot will not take less;" and upon this the defendant tendered 4*l.* 10*s.*, not being aware that the person to whom he tendered it was not the plaintiff's attorney.

J. Williams, for the plaintiff.—A tender to the clerk of the plaintiff's attorney is not good; a tender even to the attorney himself would not be good.

LORD TENTERDEN, C. J.—Where the tender is made after a letter sent by the attorney to demand payment, the case is different. If I were to hold, that a tender to an attorney who had authority to write for payment (he not disclaiming his authority at the time), was not a good tender, defendants would be deluded, as they would not think it necessary to go to the plaintiff and make a tender to him. And, if the attorney is absent from his office, I

shall hold that he is bound by the acts of those persons whom he allows to represent him in his office (a).

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J. Williams, in his reply, contended, that, as the defendant did not return the press when he had the opportunity of doing so, he was bound to pay a fair price for it, which was 5*l.* 5*s.*

Lord TENTERDEN, C. J. (in summing up).—Although the putting in of the superior materials may have fairly enhanced the price of the press; yet, if the plaintiff has stipulated to complete it with materials of an inferior value, but which would still have been sufficient for use, he is bound by his bargain, and cannot charge more than the stipulated price; and I am of opinion, that he cannot compel the defendant to rescind the contract by returning the press (b).

Verdict for the defendant.

J. Williams, and *Platt*, for the plaintiff.

Brodrick, for the defendant.

[Attornies.—*Platt*, and *J. Nokes*.]

(a) In an Anonymous case, 1 Esp. N. P. C. 349, it was proved, in support of a plea of tender, that the defendant had sent a sum of money by a servant to the plaintiff's house; this servant took it there and gave it to a servant of the plaintiff, who retired, and appeared to go with the money to the master. Lord *Kenyon* left it to the Jury to say, whether the money had been tendered, and they found that it had. In the case of *Goodland v. Blewith*, 1 Camp. 477, it was held, that a tender to an agent authorized to receive payment, is as good as a

tender to the creditor in person. In the case of *Moffat v. Parsons*, 5 Taunt. 307, a creditor had told his clerk, previously authorized to receive money, not to receive a sum from the defendant, and the clerk, on the sum being tendered, refused to receive it, and assigned the reason; this was held to be a good tender, and *Mansfield*, C. J., observed, that a tender to a managing clerk would suffice. See also the case of *Blow v. Russell*, ante, Vol. 1, p. 365.

(b) See the case of *Cash v. Giles*, ante, p. 407.

1828.

Dec. 2nd.

HILL v. JOHNSON.

In *assumpsit*, by the indorsee against the drawer of a bill of exchange, the defence was, that time had been given to the acceptor. To meet this defence, a copy of a paper that the defendant had promised to sign, was offered in evidence. By this the defendant consented to the plaintiff's using any means to obtain payment from the acceptor without prejudice of his right to recover from the drawer:—*Held*, that this paper did not require a stamp.

ASSUMPSIT by the plaintiff, as the indorsee, against the defendant, as the drawer of a bill of exchange for 52*l.*, which bill had been accepted by Colonel Ormesby.

The defence was, that the plaintiff had given time to the acceptor, and had taken a warrant of attorney from him, on which judgment had been entered up, and part of the amount paid.

To meet this case, the plaintiff's counsel proposed to put in a copy of a paper, which a witness had taken, by the desire of the plaintiff, to the defendant for his signature, and which the defendant had promised to sign, and return to the plaintiff. This paper was as follows:—

“ I, James Johnson, hereby consent to Mr. R. Hill using any means he can to enforce payment from Colonel Ormesby, for my bill drawn by me, and accepted by the said Colonel Ormesby, without prejudice to his right to recover against the drawer.”

Campbell, for the defendant.—I submit, that this requires a stamp. It is clearly evidence of an agreement between the plaintiff and the defendant, even if it is not of itself an agreement.

Lord TENTERDEN.—I think it may be read without a stamp.

The paper was read, and the cause was ultimately referred.

F. Pollock, and *Gunning*, for the plaintiff.

Campbell, and *Chitty*, for the defendant.

[Attornies—*Virgo*, and *Raphael*.]

1828.

FERGUSON v. CARRINGTON.

Dec. 3rd.

GOODS sold. Plea—General issue. It was opened, on the part of the plaintiff, that the goods had been sold by the plaintiff, a ribbon manufacturer, to the defendant, a haberdasher, at a credit which had not expired at the time of the bringing of the action; and that acceptances of the defendant were given to the plaintiff for the amount. However, it was argued on the part of the plaintiff, that if these goods were bought, not for the regular purposes of trade, but with a fraudulent intent of selling them directly afterwards at an under price, to raise money, the defendant could not set up as a defence, that the credit had not expired.

If goods be sold on a credit, the vendor cannot, before the credit has expired, maintain *assumpsit* for goods sold, even though he can prove that the goods were not bought in the fair way of trade, but for the fraudulent purpose of being immediately resold at an under price:—*Seemle*, that trover is his proper remedy.

A witness proved the sale and delivery of the goods, and that the defendant had accepted bills for the price of them, which bills had not become due. The plaintiff's counsel then proposed to call a witness to shew how the goods had been disposed of.

Sir J. Scarlett, for the defendant.—I submit that this is not evidence, this is an action for goods sold, and how are we to be prepared to meet a case of supposed fraud? We come here to shew that these goods were sold upon credit, and that that credit has not expired.

F. Pollock, for the plaintiff.—The manner of treating the goods is most material to shew that this was a fraudulent transaction.

Sir J. Scarlett.—The mode of treating the goods cannot alter the original contract. It might be good evidence in trover; but if the plaintiff bring an action upon the contract for goods sold, this evidence is not admissible.

LORD TENTERDEN, C. J.—The plaintiff alleges that the

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defendant did not buy these goods in the regular course of trade, but that he bought them for the fraudulent purpose of having them resold at a less price; and the plaintiff wishes, as the time of credit has not expired, to abandon the contract and prove fraud. Now this I think he cannot do, for he cannot treat it as a sale in one view, and reject it in another.

Nonsuit.

F. Pollock, and *Goulburn*, for the plaintiff.

Sir *J. Scarlett*, and *Thesiger*, for the defendant.

[Attornies—*E. Isaacs*, and *Haslem & B.*]

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F. Pollock now moved to set aside the nonsuit; but the Court refused a rule, and held, that, although the plaintiff might have perhaps been entitled to maintain an action of trover, yet, that if he went upon the contract, he must take that contract as it actually was, and must, if he affirmed the contract, affirm it altogether.

In the course of the discussion the case of *Parker v. Patrick* (a) was cited, and Lord *Tenterden*, C. J., observed, that the authority of that case had been questioned.

(a) 5 T. R. 175. In that case it was held, that if goods be obtained from *A.* by false pretences, and pawned to *B.* without notice, and *A.* convict the offender and get possession of his goods, *B.* may maintain trover; but the Court distinguished the case from those where a felony had been committed, because, in such cases the owner was, by the stat. 21 Hen.

8, c. 11, entitled to restitution on his prosecuting the offender to conviction. However, that statute having been repealed by the stat. 7 & 8 Geo. 4, c. 27, and the restitution of goods being regulated by the statute 7 & 8 Geo. 4, c. 29, s. 57, this distinction between the restitution of goods obtained by felony and by false pretences seems to be at an end.

1823.

HAWKINS, surviving Executor of WILLAN, v. SHERMAN.

Dec. 3rd.

CASE. The *first* count of the declaration stated, that the testator was, in his lifetime, possessed of certain messuages, &c. for the remainder of a term of forty-one years, from Christmas 1785, granted to him by the corporation of London, as Governors of Christ's Hospital, subject to certain covenants in a certain indenture of lease contained, that is to say, among other things, that the said testator should, from time to time during the term, repair the demised premises, and yield them up at the end of the term in sufficient repair, of which the defendant had notice. That, on the 1st of May, 1823, the testator assigned his interest to the defendant from the 22nd of April, 1823, subject to all the covenants contained in the lease, which, "from the said 22nd of April, on the part of the tenants, lessees, or assignees, were or ought to be observed, performed, and kept." That the defendant entered, and that it became his duty to observe and perform all the covenants in and by the said indenture reserved, mentioned, and contained, and which, from the said 22nd of April, on the part of the tenants, lessees, or assignees, were or ought to have been performed. Breach, that the defendant did not observe, perform, and keep the covenants, &c., in this, that he did not, from the said 22nd of April, sufficiently repair, &c., by reason whereof the Governors of Christ's Hospital recovered a sum of 378*l.* 15*s.* against the testator, by the judgment of the Court of Common Pleas. The *second* count stated a lease as in the first count mentioned, and that it was assigned to the defendant, and that it became his duty to perform the covenants. Breach, that the defendant did not perform the

A. agreed to take an assignment of a lease of a house, which was out of repair, from *B.*, and by the agreement it was stipulated, that all out-goings should be paid by *B.* up to April 23rd; and, by an assignment indorsed on the lease (executed by *B.* but not by *A.*), *B.* assigned the residue of the term, subject to the performance of all the covenants of the lease, which, from the 22nd day of April, ought to be observed on the part of the tenant. The lease contained a covenant to keep the premises in repair, and so to deliver them up; and, after the assignment, the reversioner sued *B.* and recovered for dilapidations which occurred before April 22nd:—*Held*, that *B.* could not maintain an action on the case against *A.* for these dilapidations, even though it could

be proved that *A.* gave a smaller price, because the premises were out of repair:—*Held*, also, that the Judge could not look beyond the written instruments, *vis.* the written agreement and the assignment. If *B.* assign the lease of a house to *A.* by deed, subject to certain covenants, and *A.* take possession, whether *B.*'s remedy for a breach of the covenants is by an action of covenant, though *A.* never executed the deed—*Quare*.

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covenants (without specifying any), by reason of which the governors recovered a sum of 378*l.* 15*s.* against the testator.—*Third* count, that the testator agreed to sell to the defendant and another, who agreed to buy the premises subject to the covenants in the lease, whereby it became the defendant's duty to repair. Breach, that he did not.—*Fourth* count, that the defendant occupied the premises subject to the covenants of the lease, and that, contrary to his duty, he did not repair.—*Fifth* count, that the defendant became tenant from year to year, and that, contrary to his duty, he permitted the premises to become ruinous for want of needful repair.—*Sixth* count, similar, except that it stated that the testator had demised to the defendant for a certain term of years.—*Seventh* count, that the defendant was tenant, and treated the premises in an untenantlike manner. Plea—Not guilty.

The case opened on the part of the plaintiff was, that the defendant had, in the year 1823, purchased of the testator the residue of a term in the Bull and Mouth Inn, and that he bought at a lower price, from the premises being then out of repair; and it was also stated, that an assignment of the lease having been prepared, it had been executed by the plaintiff but not by the defendant; and that the Governors of Christ's Hospital had sued the testator since the date of the assignment, and had recovered a sum of 378*l.* 15*s.* against him.

The lease from Christ's Hospital to Mr. *Willan* was put in. It was dated December 15th, 1785, and by it the Hospital demised the Bull and Mouth Inn to Mr. *Willan* for forty-one years, at a rent of 100*l.* a-year, subject to certain covenants, one of which was, that the premises should be kept in good repair, and so be delivered up at the end of the term.

An agreement between the executors of Mr. *Willan*, and the defendant and others, dated April 22d, 1823, was also put in. By this, the former agreed to sell, and the latter to buy, the Bull and Mouth Inn; and it was also

agreed that the lease should be assigned, and that all outgoings should be paid by the executors up to April 23d.

The assignment of the term to the defendant, which was indorsed on the back of the lease, was offered in evidence. It was executed by the plaintiff, but not by the defendant.

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Campbell, for the defendant.—This is not evidence against the defendant. It has never been executed by him.

LORD TENTERDEN, C. J.—The executors agree to assign the lease, and they have executed an assignment. I think I must receive it, to shew that the plaintiffs have performed their part of the agreement.

The assignment was read. By this the plaintiffs assigned the residue of the term to the defendant, “to hold to him, his executors, administrators, and assigns from the said 22d day of April, for and during all the rest, residue, and remainder of the said term, subject to the payment of the rent and to the performance and observance of all and every of the covenants, in and by the said indenture reserved and contained, *which from the said 22d day of April, on the part of the tenants, lessees, or assignees, were, or ought to be observed, performed, fulfilled, and kept.*”

LORD TENTERDEN, C. J.—The difficulty here is, to add anything to the terms contained in this deed of assignment. It is an assignment, subject to the payment of rent and performance of covenants, from the 22d day of April. Now, upon those words, I cannot say that the defendant is liable to dilapidations before that time.

Sir *J. Scarlett*, for the plaintiff. If this were an action founded on the covenant, it might be so; but the question

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here is, as to what was the implied agreement between the parties. Now, I mean to say, that the defendant purchased with reference to the existing state of the premises, and not as if the executors were bound to put them into complete repair up to that day.

Lord TENTERDEN, C. J.—The general rule is, that where there is a written covenant, you can add nothing to it. Here, there was not only a written agreement, but an actual assignment upon it. Can I look farther than those instruments? I think you must divide the sum, and take only for the dilapidations since the defendant came into possession.

Sir J. Scarlett.—If the premises continued out of repair, he continued to break the covenant; and though the dilapidations occurred before the assignment, they continued to be a breach after.

Campbell, for the defendant.—It is no doubt a continuing covenant as between lessor and lessee, but not so as between assignor and assignee.

Lord TENTERDEN, C. J.—I should recommend the parties to agree upon some certain amount. I am quite sure, it would be much better for them.

Verdict for the plaintiff. Damages—60*l.* by consent.

Lord TENTERDEN, C. J.—Now the case is over, I will state the difficulty that I felt, which is this: I am very much inclined to think, that, the defendant having taken possession under the assignment, the action should have been covenant, although he never executed the deed (a).

(a) See the case of *The East India Company v. Lewis*, ante, p. 358; and also, the case of *Burnell v. Lynch*, 5 B. & C. 589, 8 D.

F. Pollock.—I understand, that that point was much considered before this declaration was prepared.

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Sir *J. Scarlett*, *F. Pollock*, and *T. F. Ellis*, for the plaintiff.

Campbell, and *Hill*, for the defendant.

[Attornies—*Lyon & Co.* and *Rees & Co.*]

& R. 368, where the law on this subject was much discussed. In that case, where the same difficulty was raised, the Court held, that an action on the case, for a breach of duty, would lie, and doubted whether an action of covenant was maintainable.

FOWLER v. COSTER.

Dec. 5th.

ASSUMPSIT by the plaintiff, as the indorsee, against the defendant, as the drawer of certain bills of exchange. Plea in abatement, that the several promises in the declaration mentioned, were made jointly with a person named Cunningham. Replication that the promises were not made jointly with Cunningham (a).

Assumpsit.—Plea in abatement, that the promises were "made jointly with A." Replication, that they were not made jointly with A. On the trial of this issue, the defendant begins.

Lord TENTERDEN, C. J., held, that on these pleadings the defendant had the right to begin (b).

Verdict for the plaintiff.

Campbell, and *Comyn*, for the plaintiff.

Sir *J. Scarlett*, and *R. S. Richards*, for the defendant.

[Attornies—*Walker*, and *Llewellyn*.]

(a) The forms of this plea and replication, will be found, 2 Ch. Pl. 449 and 615.

Howard, 2 Stark. 555, where the defendant had pleaded in abatement, that the promises were made jointly with G. D., and the

(b) In the case of *Robey v.*

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IN the ensuing Term, *R. S. Richards*, moved for a new trial, on the ground that the verdict was against evidence; but the Court refused a rule.

replication denied that the promises had been made jointly, it was held that the plaintiff had the right to begin, as he had to prove his damages. However, this case

seems to be overruled in the principal case, as well as by the cases of *Cooper v. Wakley*, *post*, p. 474, and *Cotton v. James*, *post*.

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GEORGE v. RADFORD.

A sheriff's officer having a warrant from the sheriff to arrest a party for debt, went to the party and read his warrant to him, and then, having taken a fee, proceeded to the party's attorney, to let him know it, for bail to be put in. After this, the officer returned that he had taken the party:—*Semle*, that this is no arrest.

In an action for a malicious arrest, the plaintiff's counsel had closed his case, and the defendant's counsel had begun to address the Jury, when the Lord Chief Justice said, he would nonsuit, on the ground that there was no evidence of malice. The plaintiff's counsel

CASE for a malicious arrest. Plea—General issue. The declaration stated, that the plaintiff was “arrested by his body and imprisoned.”

To shew an arrest and imprisonment, a sheriff's officer, named Walbank, was called, who stated as follows:—“I received a warrant from the Sheriff of London, to arrest the plaintiff; I went to his house, and told him I had a writ against him for 50*l.*, at the suit of Mr. Radford; and I read a paper to him; I told him, that as I knew him, I would take his word, but that he must give bail. He gave me a fee, I think about two pounds or under, and I went to his attorney, and told him what had occurred, and that bail must be put in. I did not lock the plaintiff up, nor did I take him away; however, I made a return that I had arrested him.”

Sir J. Scarlett, for the defendant.—This is neither an arrest, nor an imprisonment. The officer neither touched the person of the plaintiff, nor did he detain him.

Brougham, for the plaintiff.—It has been repeatedly held, that, to constitute an arrest, there need not be an actual touching of the party, nor a locking him up. In the

wished to adduce further evidence, but was not permitted, the Lord Chief Justice observing, that the rule of not permitting a party to adduce fresh evidence, after such party had closed his case, had been already too much relaxed.

case of *Berry v. Adamson* (a), where the Court held that there had been no arrest, the officer had not even gone near the party. But here the officer goes to arrest the plaintiff, he states what he comes for, and the plaintiff acquiesces in the arrest.

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Chitty, on the same side.—In *B. N. P.* 62, it is said, that there need not be an actual touching, to constitute an arrest, and that if the party acquiesces, it is sufficient. Now, that the plaintiff in this case submitted to the arrest is clear, from his giving the officer two pounds. It therefore stands thus: the officer goes for the purpose of arresting, and having stated what he comes for, his authority is acquiesced in; and the present defendant afterwards admitted that there was a good arrest, as he declared against the plaintiff as in custody of the marshal (b).

LORD TENTERDEN, C. J.—This case is not exactly like that of *Berry v. Adamson*. I will therefore reserve the point.

Sir *J. Scarlett*.—It is not necessary that there should be a touching of the party, or a locking him up; but I never heard, that giving two pounds not to be arrested, was an arrest. Here the officer reads a paper, gets some money, and then goes away, without requiring the party to go with him.

LORD TENTERDEN, C. J.—If the party had gone with the officer, that would have been enough.

Sir *J. Scarlett*.—It is doing away with common sense, to introduce these constructive arrests, which only introduce fine distinctions. What shall we say to this case?

(a) *Ante*, Vol. 2, p. 503.

the same on serviceable process,

(b) This form of declaring proves little, because the form is

where there is no arrest.

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Suppose the officer had looked through the window, and said, I have a writ, what shall I do with it? Oh, says the party, take it to my attorney. Is this an arrest? If it be, we shall soon come to arresting by means of a twopenny-post letter.

LORD TENTERDEN, C. J.—I own that my strong opinion is, that this is no arrest, but as the opinions of others may not coincide with mine, I will, to save the expense of coming here again, let the case proceed. I am bound to say, that I much disapprove of this mode of executing writs, as it enables these officers to obtain sums of money for not doing their duty.

The plaintiff's case then proceeded to its close, and Sir *J. Scarlett* had begun to address the Jury for the defendant, when

LORD TENTERDEN, C. J., stopped him, observing, that there was no evidence of malice, and that therefore the plaintiff must be nonsuited.

Brougham, for the plaintiff, wished to call more witnesses.

LORD TENTERDEN, C. J.—You had closed your case, and Sir *J. Scarlett* had begun to address the Jury. If you had any more evidence, you should have adduced it before you had closed your case. I cannot receive it now.

Brougham.—The strict rule has been very much relaxed.

LORD TENTERDEN, C. J.—Perhaps too much, as, I am sorry to say, a great many other rules have been. The plaintiff must be called.

Nonsuit.

Brougham, and *Chitty*, for the plaintiff.

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Sir *J. Scarlett*, and *Jeremy*, for the defendant.GEORGE
v.[Attornies—*Nias*, and *Rogers & Son*.]

RADFORD.

KNIGHT v. HUGHES, Gent., One, &c.

Dec. 6th.

ASSUMPSIT for money paid. Plea—General Issue.

This action was brought for contribution (a). The plain-

A. & B. were
sureties for C.,
a collector of
taxes, who be-
came a defaulter,

The obligees sued A., and recovered:—*Held*, that in an action for contribution, brought by A. against B., A. could only recover half the amount of the verdict against him, and that he could not recover from B. either the half of the taxed costs of the obligees, or the half of his own costs of defending the action brought by the obligees.

Held also, that if A., after the verdict in the action against him on the bond, obtain a sum of money from C., he must take that in reduction of the amount of the verdict, and cannot apply it either to pay his own costs or the taxed costs of the obligees.

(a) On the subject of contribution, Lord *Kenyon*, in the case of *Turner v. Davies*, 2 Esp. 478, says, "I have no doubt that where two parties became joint sureties for a third person, if one is called upon and forced to pay the whole of the money, he has a right to call on his co-security for contribution, but where one has been induced so to become surety at the instance of the other, though he thereby renders himself liable to the person to whom the security is given, there is no pretence for saying that he shall be liable to be called upon by the person at whose request he entered into the security."

As to contribution, where the parties were *tort feorsors*, see the case of *Merryweather v. Nisan*, 8 T.R. 186, (cited *ante*, Vol. 2, p. 417, n.); and as to cases where the original action had been in *tort*, see the case of *Wooley v.*

Batte, *ante*, Vol. 2, p. 417.

With respect to the liability of a principal to indemnify his bail, it was held in the case of *Fisher v. Fallow*, 5 Esp. 171, that, where a person becomes bail for another, he is entitled to recover from his principal all the expenses he has been put to by reason of it; and the principal having absconded, it was held, that the bail might recover the expenses of sending after his principal, to take him, in order to render him; but not the expenses of a suit commenced against him (the bail) by the person he sent after the principal, for a compensation for his services, which suit he had improperly defended: and in that case Lord *Ellenborough* said, "The relation of principal and bail is this—The principal engages to indemnify the bail from all expenses fairly arising from his situation as bail. I think the indemnity goes against

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tiff and the defendant had been sureties for a person named Winkles, as collector of the assessed taxes of the parish of St. Mary, Islington. Winkles having become a defaulter, separate actions were brought against the plaintiff and the defendant on their bond; the former of these actions had been tried, and a verdict had passed against the present plaintiff for 1149*l.* (a), but the action so brought against the present defendant on the bond had not been proceeded in. The present plaintiff had paid the amount of that verdict, and the taxed costs of Mr. Loveland (the then plaintiff), and he also had incurred costs in his own defence.

It was admitted on the part of the defendant, that the plaintiff was entitled to a verdict for one half of the amount of the original verdict, subject to the deduction of two sums which the present plaintiff had succeeded in recovering from Winkles, the principal, which would reduce the moiety now to be recovered to 516*l.*

F. Pollock, for the plaintiff.—I submit that the defendant is liable to pay half of the original plaintiff's taxed costs, and one half the costs of the defence of the original action, as well as to pay a moiety of the amount of the verdict.

Lord TENTERDEN, C. J., inquired if there was any authority in support of that proposition.

F. Pollock replied, that he had not been able to find any.

all charges which are necessary to secure themselves. The bail have a right to surrender their principal in their own discharge, and for their own security. If, therefore, the principal absconds, so that he cannot be had, the bail may take every proper and necessary step to secure him."

In the case of *Reason v. Widdam*, 1 C. & P. 434, it was held, that a person cannot maintain an action for his trouble and loss of time, in going to a place to become bail for another.

(b) That case is reported *ante*, p. 106.

Lord TENTERDEN, C. J.—In the absence of any authority to that effect, I shall hold that the defendant is only liable to pay one moiety of the amount of the verdict.

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Busby, for the defendant.—I submit that from that moiety we have a right to deduct half of the two sums obtained by the plaintiff from Winkles.

F. Pollock.—Those two sums being received of Winkles, the present plaintiff has, I apprehend, a right to set them against the costs.

Busby.—That would be so if the question were between the plaintiff and the principal; but, as between the two sureties, it is otherwise.

Lord TENTERDEN, C. J.—I think that, in this case, whatever the plaintiff has received since the verdict, in respect of this transaction, must, as between these parties, be considered as having been received in reduction of the amount of the verdict, and that the plaintiff has no right to retain such sums against the costs. However, I will give *Mr. Pollock* leave to move to increase the amount of the verdict, from 516*l.* to 574*l.* (a); which would give the plaintiff these two sums to set against the costs, if the Court should think he has a right to do so.

Verdict for the plaintiff.—Damages 516*l.*

F. Pollock, and *C. Cresswell*, for the plaintiff.

Busby, for the defendant.

[Attornies—*Godman*, and *Hughes*.]

(a) No motion was made.

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Dec. 6th.

CROCKER v. MOLYNEUX.

A servant being engaged for a year at thirty guineas and a suit of clothes, was provided with a livery suit on his entering the service. He was wrongfully turned away within the year:—*Held*, that he could not maintain trover for the clothes, that not being the proper form of action.

TROVER, for a suit of clothes. Plea—General issue. It appeared that the plaintiff was hired as a servant, by the defendant, on the 16th June, 1827, at thirty guineas a-year, and a suit of clothes; and that he had, on entering the service, been provided by the defendant with the clothes in question, which were a sort of livery suit, which the plaintiff wore when his mistress drove out. It was also proved, that the defendant dismissed the plaintiff, without any sufficient cause, before the year had expired.

Campbell, for the defendant.—The plaintiff must be nonsuited. To support an action of trover, the plaintiff must have a property in the clothes. Now these clothes were not to become his property, till he had served the year.

J. Williams, contra.—I submit, that as he was hired for a year upon the terms of having wages and clothes, he is entitled to the clothes if he was willing to have stayed his year; but he was prevented from doing so, by the wrongful act of the defendant.

Lord TENTERDEN, C. J.—This action is founded in property. If the plaintiff was dismissed without reasonable cause, whereby he was prevented from becoming entitled to this suit of clothes, he has his action for that; but he cannot maintain an action of trover, because he has no property in the clothes till he has served a year.

Nonsuit.

J. Williams, and ———, for the plaintiff.

Campbell, for the defendant.

[Attornies—*Sparkes*, and *Knight*.]

For this report we are indebted to the kindness of a friend at the bar.

See the case of *Archard v. Honor*, ante, p. 349.

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GREEN v. BOTHEROYD.

Dec. 6th.

DEBT for penalties under the stat 25 Geo. 2, c. 36, for keeping a house for the public performance of music, without a license (a). Plea—General issue.

On the part of the plaintiff it was proved, that the defendant kept a tavern called the King's Arms, in Beech Street, Barbican, and that on Tuesdays and Fridays there were concerts, to which the price of admission was two-

The stat. 25 Geo. 2, c. 36, relating to places for public dancing, music, &c., extends to licensed taverns and hotels: and it is no defence, that the company frequenting

the performances were respectable, or that the admission money was not received for the benefit of the keeper of the house.

The 13th sect. of that stat. which gives a form of declaration, extends to common informers.

(a) The declaration was framed under s. 13 of that stat. (which was made perpetual by the stat. 28 Geo. 2, c. 19). It was in the following form: "London, to wit —J. G., the plaintiff in this suit, complains of R. B., the defendant in this suit, being in custody of the Marshal of the Marshalsea of our lord the now King before the King himself, of a plea that he render to him the sum of 3,600*l.*, of lawful money of Great Britain, which he owes to and unjustly detains from him. For that whereas the said defendant, on the — day of —, in the year —, and within the space of six calendar months before the commencement of this suit, at London, to wit, in the parish of St. Mary-le-Bow, in the ward of Cheap, was indebted to the said plaintiff in divers, to wit, thirty sums of 100*l.* each, amounting in the whole, to wit, to the sum of 3000*l.*, being forfeited by an act, intituled, 'An act for the better preventing thefts and robberies, and for re-

gulating places of public entertainment, and punishing persons keeping disorderly houses,' whereby, and by force of the statute in that case made and provided, an action hath accrued to the said plaintiff, to demand and have of and from the said defendant, the said sum of 3000*l.*, parcel of the said sum above demanded. And whereas also, &c." [There were five other counts exactly in the same form, each for 100*l.* "other parcel of the said sum above demanded:" and the last count only varied instating it to be, "residue" instead of "parcel" of the sum. Each of these six counts stated the offence to be on a different day.] The declaration then concluded, "yet the said defendant, though often requested so to do, hath not, as yet, paid to the said plaintiff the said sum of 3,600*l.* above demanded, or any part thereof, but he so to do hath hitherto wholly neglected and refused; and therefore the said plaintiff brings his suit, &c. pledges," &c.

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pence. Evidence was also given that there had been a search at the clerk of the peace's office, and that no entry of any license could be found there.

Brougham, for the defendant.—I submit that the houses contemplated by this act of Parliament, were not such as the defendant's. This act was never intended to prevent a concert in a licensed tavern or hotel, because, by this act there is a power given to seize all persons who are found therein; indeed, the defendant's house is not a house kept for music or dancing. I also have to submit that the 13th sect. of this act does not apply to common informers. It cannot be said, that there is no other class of persons that this section can apply to, as the 5th sect. relates to parish officers, who are called upon to prosecute houses of ill fame.

Lord TENTERDEN, C. J.—I am quite against you upon both points; but if you can make any thing of them you may mention them hereafter (a).

Witnesses were called to shew that the two-pences received for admission to these concerts, were paid over to the performers, and that the defendant therefore did not receive any benefit from the money taken for admission; and evidence was also given to shew that those who frequented the house, were respectable persons, and that they behaved in a peaceable and orderly manner.

Lord TENTERDEN, C. J.—The witnesses in this case have proved that the defendant has kept a room for a public entertainment of music, to which persons were admitted at two-pence a-head. Now it is quite immaterial, whether he received this for his own benefit or for others. With regard to the respectability of the company, that can

(a) No motion was made.

make no difference; for if they had been the members of the two houses of Parliament, with their wives and daughters, the law would equally apply.

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Verdict for the plaintiff for one penalty of
 100*l* (a).

Sir *J. Scarlett*, and *Chitty*, for the plaintiff.

Brougham, and *Patteson*, for the defendant.

[Attornies—*Whiteley*, and *Thomas*.]

(a) By the stat. 25 Geo. 2, c. 36, s. 2, (made perpetual by the stat. 28 Geo. 2, c. 19), it is enacted that any house, room, garden, or other place, kept for public dancing, music, or other public entertainment of the like kind, in *London or Westminster, or within twenty miles thereof*, without a license for that purpose, shall be deemed a disorderly house or place, and the person keeping the same shall forfeit 100*l*. to such person as will sue for the same. By sect. 13, a short form of declaration is directed; and by sect. 14, actions must be commenced within six calendar months after the offence committed.

In the case of *Archer v. Wil-
 lingrice*, 4 Esp. 186, Lord *Ellen-
 borough* held, that, to make a party
 liable to a penalty under this act,

it is not essential that he should take money for admission; and that it was sufficient to shew that dancing was publicly carried on in a house belonging to the defendant, without its being duly licensed. His Lordship also said, that the taking of money for admission would be evidence of ownership. His Lordship confirmed the case of *Bellis v. Burghall*, 2 Esp. 722. In that case, a room, kept by a dancing master, where persons met for the purpose of dancing, but to which no persons were admitted but subscribers, or persons introduced by them or by the defendant as their and his friends, and to which persons were not indiscriminately admitted, was held not to be within this act.

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Adjourned Sittings at Westminster, after Michaelmas Term, 1828.

BEFORE LORD TENTERDEN, C. J.

Dec. 12th.

COOPER v. WAKLEY.

If, in an action for a libel, the defendant plead justifications, without pleading the general issue, and the affirmative of the issue be on the defendant, he is entitled to begin, and the plaintiff has not, in such case, a right to begin, with a view of proving the amount of his damages.

If a defendant, in an action for libel, imputing want of skill to a surgeon, plead that the plaintiff did want skill, and that he performed an operation in an un-surgeonlike manner, occupying unnecessary time, and causing unnecessary pain, these are all affirmatives on the part of the defendant.

LIBEL. The declaration stated, that the plaintiff, long before, &c. "had been, was, and still is a surgeon, and had used, exercised, and carried on the profession and business of a surgeon with great credit and reputation, to wit, in the county aforesaid;" that he had been and was surgeon of a certain hospital called Guy's Hospital, and nephew of Sir Astley Cooper, Bart.; and that the defendant composed, wrote, and published a certain libel. Different parts of this libel were set forth in the first *four* counts of the declaration. It professed to describe an operation of lithotomy performed by Mr. Cooper, calling it a tragedy; and, from the circumstances it professed to state, it imputed to him a want of skill. The *fifth* count of the declaration stated a distinct libel, which professed to be a reply to certain statements that had appeared in the newspapers; this libel stated, *inter alia*, that the operation occupied fifty-five minutes, "the average *maximum* of time in which this operation is performed by skilful surgeons being about six minutes." This libel also imputed that Mr. Cooper had been indebted for his elevation to a corrupt system; and that, whatever might be his private virtues, he would never have been placed in a situation of such deep responsibility, had he not been the nephew of Sir Astley Cooper. By means, &c. the plaintiff "has been and is greatly prejudiced," &c.

The *first* plea (a) (which was to the first four counts of the declaration,) stated, that the plaintiff did perform the

(a) There was no plea of the general issue.

operation of lithotomy on one S. P.; and this plea then went on to re-assert all the statements of the libel in the very words of the libel, *mutatis mutandis*.

The *second* plea (which was to the *fifth* count of the declaration only) stated, that the plaintiff ought not to have or maintain his aforesaid action, "because he says, that before," &c., to wit, on &c., at &c., the said plaintiff being such surgeon as aforesaid, had performed the said operation of lithotomy, and "did not extract the stone until the end of fifty-five minutes, the average *maximum* of time in which such operation is performed by skilful surgeons being about six minutes; and that the said operation was a melancholy exhibition, and was performed by the said plaintiff without proper and sufficient skill, dexterity, and self possession; and that the said plaintiff did not perform the said operation with that degree of skill which the public has a right to expect from a surgeon of Guy's Hospital. That the said case did not present such difficulties, as no degree of skill could have surmounted in less time or with less disastrous consequences; and that the said patient lost his life, not because his case was really one of extraordinary difficulty, but because the said plaintiff performed the said operation upon him as aforesaid." This plea then went on to aver, that the plaintiff owed his elevation to a corrupt system, &c. (in the words of the latter part of the libel stated in the fifth count).

The *third* plea stated, that, "as to the publishing of so much of the said supposed libellous matters in the said declaration mentioned, as impute to the said plaintiff unskilfulness as a surgeon in the performance of the said supposed operation therein mentioned;" the said defendant says, that the said plaintiff ought not to have or maintain, &c. because he says, that before &c., to wit, on &c., at &c., "the said plaintiff performed the said operation of lithotomy in the said second plea mentioned, and therein occupied a long space of time, to wit, the space of fifty minutes, being a much longer time than was necessary or proper, or than a skilful surgeon would have occupied in that behalf; and that the said

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plaintiff then and there performed the said operation in an unskilful and unsurgeonlike manner; and did then and there by such unskilfulness cause the said patient a much greater degree of pain and suffering than he would otherwise, and but for that cause, have incurred; and that it was and is doubtful and questionable whether or not the death of the said patient was caused by such unskilfulness aforesaid; and whether, if due and proper skill had been used in the said operation, the life of the said patient would not have been saved; wherefore the said defendant afterwards, to wit, &c. published," &c.

The *fourth* plea was, that as to the publishing of so much of the said libellous matters in the introductory part of the said last plea mentioned, as impute to the said plaintiff unskilfulness as a surgeon in the performance of the said supposed operation therein mentioned, the said defendant "by leave, &c., says, that the said plaintiff ought not to have or maintain, &c.; because he says, that before &c. the said plaintiff performed the said operation of lithotomy in the said second plea mentioned, and therein occupied a long space of time, to wit, the space of fifty minutes, being a much longer time than was necessary or proper, or than a skilful surgeon would have occupied in that behalf; and that the said plaintiff then and there performed the said operation in an unskilful and unsurgeonlike manner, and did then and there by such unskilfulness cause the said patient a much greater degree of pain and suffering than he would otherwise, and but for that cause, have incurred, wherefore," &c.

The *fifth* and *sixth* pleas went to justify those parts of the libels which stated that Mr. Cooper was indebted for his elevation to the influence of a corrupt system, &c.; —and the *seventh* plea stated, that Guy's Hospital was a public hospital, and that the plaintiff, being the editor of a periodical and critical work called the *Lancet*, published the alleged libels, they being true and correct reports of what had occurred.

Replication, *de injuria*.

R. Scarlett, for the plaintiff, having opened the pleadings—

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Sir *J. Scarlett*, as the plaintiff's leading counsel, contended, that the plaintiff had the right to begin, the affirmative of the issue being upon his client; and he argued, that, as the issue was, whether the plaintiff had performed an operation in an unskilful and unsurgeonlike manner, and had occupied too much time, it was incumbent upon the plaintiff to give evidence of his skill.

Lord TENTERDEN, C. J.—That he occupied too long a time is an affirmative.

Sir *J. Scarlett*.—Besides this, I submit, that, as the damages are unliquidated, that gives the plaintiff a right to begin, to shew the extent of the injury he has received.

Lord TENTERDEN, C. J.—Till the issue is tried that question does not arise.

The defendant, in person, relied on the cases of *Hodges v. Holder* (a), *Jackson v. Hesketh* (b), and *Bedell v. Russell* (c).

(a) 3 Camp. 366.—That was an action of trespass *quare clausum fregit*, and the defendant had pleaded, that, as to coming with force and arms, and whatever else was against the peace, he was not guilty; and as to the residue, a right of way, which was denied by the replication. *Bayley*, J., held, that the defendant should begin, as not guilty as to the force and arms was not a general issue, and did not throw any necessity of proof upon the plaintiff.

(b) 2 Stark. 518.—In this case the pleadings were exactly similar to those in the case of *Hodges*

v. Holder. *Bayley*, J., after conferring with *Wood*, B., held the defendant entitled to begin, observing, that the denial of what was against the peace was put in merely to save a fine to the king; and *Bayley*, J., also said: "The party who has to prove the affirmative of the issue ought to begin; and where there are several issues, and the proof of one of them lies upon the plaintiff, he is entitled to begin. The question of damages never arises till the issue has been tried."

(c) R. & M. 293.—This was an action for assaulting, beating, and

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Sir *J. Scarlett*.—On the question of skill or no skill, the proof of the affirmative is proof of the skill. The plaintiff here complains of the defendant's charging him with want of skill; and the defendant, by his pleas, has put the plaintiff's skill in issue. Now, as the defendant has denied the skill of the plaintiff, it lies upon the plaintiff to prove it; and the last case cited shews that Lord Chief Justice *Best* thought that the plaintiff should have begun, and would have so held, except that he felt himself bound by the previous authorities.

Lord TENTERDEN, C. J. (addressing the defendant).—You see that Sir *James Scarlett* contends, that certain parts of your pleas call upon him to prove an affirmative. It therefore becomes material to consider what these several pleas are. In the *second* plea, you allege that the operation was performed by the plaintiff without proper and sufficient skill, and that the operation did not present such difficulties as no degree of skill could have surmounted; but because the operation was performed as aforesaid, you justify the publication. The *third* plea is, that the plaintiff, in performing the operation, occupied a longer time than was necessary, and performed it in an unsurgeonlike manner, causing greater pain to the patient than was necessary;—and the *fourth* plea is, that the operation occupied

shooting at the plaintiff. Pleas (without the general issue), that the plaintiff was a mariner on board a ship, of which the defendant was commander, and that the plaintiff was engaged in a mutiny, to suppress which the defendant committed the trespasses. Replication *de injuria*. *Vaughan*, Serjt., for the plaintiff, contended, that he had a right to begin, to shew the amount of damages; and he argued, that the previous cases had been mere questions of right;

this, on the contrary, was one where the damages were the essence of the inquiry. *Best*, C. J., observed, that, but for the authorities, he should have thought that the *onus* of proving damages gave the plaintiff a right to begin: but his Lordship said, that it being of the utmost consequence that the practice should be uniform, he should consider himself bound by the cases; and he directed the defendant's counsel to begin.

a longer time than was necessary, and was performed in an unskilful manner. These being the allegations of the pleas, Sir *James Scarlett* contends, that he should begin by proving the plaintiff's skill. Now, upon that, do you wish to make any further observation?

The defendant.—I charge the plaintiff with unskilfulness, and come here prepared to prove it.

Lord TENTERDEN, C. J.—As the decision in this case will probably be quoted as a precedent, I shall avail myself of the assistance of the other learned Judges (a).

His Lordship then went out of Court to confer with *Bayley*, *Littledale*, and *J. Parke, Js.*, and on his return said: "I am of opinion that the defendant has a right to begin. The general rule is, that that party on whom the affirmative lies has to begin; and in one, at least, of the cases cited, the plaintiff was seeking to recover unliquidated damages. I mean the case of *Bedell v. Russell*. It has been said, that here the affirmative is upon the plaintiff:—however, upon reading these pleas, I find nothing of that kind. The plaintiff must, in the first instance, be taken to exercise his profession with skill, as no one is presumed to have misconducted himself; and, if the defendant asserts that the plaintiff wanted skill, and occupied unnecessary time in the performance of an operation, it lies upon him to prove it; and so, if the defendant says, that an operation was unskilfully performed, and caused more pain than was necessary, it lies upon him to prove that also. It is incumbent upon the defendant to make out the truth of all these assertions; and till that is done, the plaintiff is not called upon to go into any evidence. I ought also to add, that my learned brothers concur with me in this opinion."

(a) Their Lordships were sitting in the Bail Court, under the King's warrant.

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The defendant then stated his case to the Jury, and called his witnesses. After that the plaintiff's counsel addressed the Jury, and called witnesses; and the defendant replied.

Lord TENTERDEN, C. J., left it to the Jury to say, whether the allegations of the pleas had been made out to their satisfaction.

Verdict for the plaintiff.—Damages, 100*l*.

Sir *J. Scarlett*, *F. Pollock*, and *R. Scarlett*, for the plaintiff.

The defendant, in person.

[Attornies—*Paterson & Peile*, and *Fairthorn & Lofty*.]

As it is now decided, that if a defendant pleads affirmative justifications without the general issue, he has a right to begin; there is little doubt that plaintiffs will exercise their ingenuity to make the defendants put the general issue on the record. Now, one way in which this can be effected is, by adding another count to the declaration, charging the defendant with some supposed cause of action which can be joined with the real one, but which has no foundation in fact, *e.g.* in trespass *quare clausum fregit*, to add a count for

an assault. Now, as this supposed assault never happened, the defendant must plead the general issue to this count, and so put the affirmative of one of the issues upon the plaintiff; however, if it appeared at the trial that this was a mere trick to get the reply, it is by no means clear that the Judge would allow it to prevail; and whether it did prevail or not, the plaintiff would do well to consider whether the attempting a trick of that sort would not do him more harm with the Jury than the reply itself would do him good.

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VINCENT v. COLE.

Dec. 18th.

WORK and labour. Plea—General issue. The plaintiff, a builder, sought to recover a sum of 91*l.* for extra work. It was opened, that the defendant had employed the plaintiff to rebuild a house, No. 23, Greek Street, Soho, under a contract, at the price of 525*l.*, and that the plaintiff, besides doing this (for which the sum of 525*l.* had been paid), had pulled down a shed, and made certain excavations, which were charged as extra work, these things not being included in the contract; and it was also alleged, that the plaintiff was entitled to recover one half of the expense of a party wall as extra work, as only one moiety of the expense of it was included in the contract.

The surveyor, who proved that the work had been done, stated, that a written agreement had been drawn up and signed by the parties.

This agreement was produced, but it was not stamped.

Sir *J. Scarlett*, for the defendant.—Whether certain works were within the terms of a written agreement or not, can only be proved by the agreement itself; and if such agreement is not stamped, it cannot be read, and the plaintiff must be called.

Gurney, for the plaintiff.—We do not sue on the written agreement. This work was not done under it. The agreement, therefore, forms no part of our case. However, I submit, on the authority of the case of *Rex v. Pendleton* (a), that the Court may look at this unstamped agreement, to see that the work for which we seek to recover is not included in it.

Sir *J. Scarlett*.—The objection I take was not made at the sessions in the case of *Rex v. Pendleton*, and that is so stated by Mr. Justice *Le Blanc* (b).

A. had built a house for *B.* under a written contract, not admissible in evidence for want of a stamp. *A.* sued *B.* for the value of certain works about the house, alleging them to be extras, and not included in the contract:—*Held*, that the Court could not look at the unstamped contract to ascertain whether those works were included in it or not, and that the plaintiff must be nonsuited.

(a) 15 East, 449.

(b) Id. 451.

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Lord TENTERDEN, C. J.—Unless I look at the agreement, how can I tell whether the taking down of the shed and the excavations are not within the terms of it; and without that, how can I say, that the plaintiff was not to build the entire party-wall.

Sir *J. Scarlett*.—If this objection does not prevail, very great uncertainty will be introduced in the practice of proving written instruments.

Lord TENTERDEN, C. J.—I think the safest course will be, to exclude this evidence. With respect to the necessity of proving written instruments by the production of the instruments themselves, I know that I hold more strictly than some other Judges. I think that I ought to nonsuit the plaintiff.

Nonsuit.

Gurney, and *Archbold*, for the plaintiff.

Sir *J. Scarlett*, and *John Evans*, for the defendant.

[Attornies.—*Selby & B.*, and *Elkins*.]

In the ensuing Term, *Gurney* moved to set aside the nonsuit, but the Court refused a rule.

In the case of *Rex v. Holy Trinity, in Kingston on Hull*, 7 B. & C. 611, it was held, that, although there might be a written instrument defining the terms of a tenancy, yet the fact of the tenancy might be proved by parol; and Mr. Justice *Littleale* observed, that payment of rent was evidence of a tenancy, and might be proved without any written instrument. However, in the case of *Strother v. Borr*, 5 Bing. 136, which was an action for an injury done to the plaintiff's reversion,

the question was, whether parol evidence, that the occupier was tenant of the plaintiff, was sufficient proof that the reversion was in the plaintiff, it being proved that the occupier held under a written agreement. But upon this point the Court was divided in opinion.

The cases in which an unstamped instrument is evidence for collateral purposes, will be found collected in 1 Phill. Law. of Ev. p. 518, and 2 Saund. Pl. & Ev. 828.

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THOMPSON v. LEWIS.

Dec. 19th.

ASSUMPSIT by the plaintiff, as an apothecary, to recover for certain draughts supplied to the defendant; and also for dressings to be applied to a wound in the defendant's arm.

To prove that the plaintiff was in practice as an apothecary, on or before the 1st day of August, 1815, witnesses were called, who stated, that they had known the plaintiff attend people from a period antecedent to that date, and down to the present time, but on their being asked whether the plaintiff was a quack who attended people for particular disorders, no cure no pay, the witnesses said they did not know. There was no evidence of the plaintiff's keeping a shop till long after the year 1815, or of his having any shop-boy to carry out medicine, or of his ever having made up the prescription of any physician, though one of the witnesses said that he considered the plaintiff to be capable of making up a prescription.

The defence was:—*First*, that the plaintiff was a person who undertook to cure particular disorders, no cure no pay, and that, therefore, he had not practised as an apothecary on or before the 1st day of August, 1815; and *second*, that he had agreed not to charge the plaintiff any thing unless he effected a cure, which he had not done; and to prove this second defence, evidence was adduced on the part of the defendant.

Lord TENTERDEN, C. J. (in summing up).—To support this action, it must be proved that the plaintiff practised as an apothecary on or before the 1st day of August, 1815. It is contended, on the part of the defendant, that the plaintiff was not an apothecary, but merely a person who went about to cure certain local complaints, no cure no pay; now, if that be so, I think that that is not a sufficient practising as an apothecary to satisfy this act.

If in an action for an apothecary's bill, it appear that the plaintiff, on and prior to the 1st of August, 1815, was a curer of certain local complaints, but did not keep any shop or make up the prescriptions of physicians, he will not be entitled to recover the amount of his bill.

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The merely going about curing these particular local complaints not being, in my judgment, a practising as an apothecary. The duty of an apothecary is to prepare the medicine directed by the prescriptions of physicians; and, in the fifth section of the stat. 55 Geo. 3, c. 194, it is recited, that, "it is the duty of every person using or exercising the art and mystery of an apothecary, to prepare with exactness, and to dispense such medicines as may be directed for the sick by any physician lawfully licensed." In the present case, there is no evidence that the plaintiff ever made up a single prescription: indeed it does not appear that the plaintiff kept any shop till very lately. You will therefore say, whether the plaintiff was a mere curer of local complaints, or whether he was in the habit of making up the prescriptions of physicians. If the evidence convinces you of the latter, there is no doubt of the plaintiff's having practised as an apothecary; and it will then become material to consider the second point, whether, in this instance, he was to be paid only in the event of effecting a cure. Now, on this point, one of the witnesses has proved that the plaintiff agreed "to take nothing if he did not effect a cure," which cure it appears he has not effected. If you believe that witness, the defendant will, on that ground, clearly be entitled to your verdict.

Verdict for the defendant.

Reader, and *Platt*, for the plaintiff.

Sir J. Scarlett, for the defendant.

[Attornies—*Wade*, and *Tanner*.]

By the stat. 55 Geo. 3, c. 194, s. 21, "No apothecary shall be allowed to recover any charges claimed by him in any Court of law, unless such apothecary shall prove on the trial that he was in

practice as an apothecary prior to or on the 1st day of August, 1815, or that he has obtained a certificate to practise as an apothecary from the master, wardens, and society of apothecaries." In the

case of *The Apothecaries' Co. v. Warburton*, 3 B. & A. 40, it was held, that the mere administering of medicine is not enough to justify the conclusion that the party practised as an apothecary; and if evidence is given that the party could not read prescriptions, and did not know the weights and measures used by apothecaries, it is cogent evidence from which a Jury may presume that he did not practise as an apothecary. In the case of *Brown v. Robinson*, ante, Vol. 1, p. 264, it was held, that administering medicines while in the service of another person as an apothecary's assistant, is not a practising as an apothecary, though the person so administering the medicines is himself paid for them. And in the case of *Alison v. Haydon*, ante, p. 246, it was decided, that admission as a member of the

Royal College of Surgeons does not entitle a party to charge for medicines administered by him while attending a patient suffering under typhus fever; but it was there held, that he may charge for medicine administered in a surgical case, where the medicine is subservient and subordinate to the discharge of his duty as a surgeon. In the case of *Steed v. Henley*, ante, Vol. 1, p. 574, it was held, that if a party, who furnishes medicines, cannot recover the price of them under the stat. 55 Geo. 3, c. 194, he cannot recover even for the phials in which such medicines were contained.

As to proof of certificates of examination, see the cases of *Walmisley v. Abbot*, ante, Vol. 1, pp. 309 & 495, and *Chadwick v. Bunning*, ante, Vol. 2, p. 306.

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WEBB v. HILL and Another.

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CASE, for a malicious arrest. The declaration stated, that the defendants maliciously, and without probable cause, sued out a bill of Middlesex, marked for bail for the sum of 15*l.*, upon which the plaintiff was arrested and imprisoned; and the termination of the former suit was averred in the following manner:—"And the said plaintiff in fact saith, that the said defendants did not prosecute their said suit against the said plaintiff, but therein wholly failed and made default, and thereupon afterwards, to wit, in

In a declaration for a malicious arrest, the termination of the former suit was alleged thus:
"That the defendants did not prosecute their suit, but therein wholly failed and made default, and thereupon it was considered that they should take nothing by their

bill, and that their pledges should be in mercy, and the plaintiff go thereof without day, *proout patet per recordum*.—*Held*, that this allegation was not proved by the production of a rule to discontinue on payment of costs, and the proof of the payment of such costs:—

Held, also, that the Court cannot reject the allegation of the judgment of *nonpross*, as, without that, it would not be shewn how the suit was terminated:—

Held, also, that this was not a variance amendable under the stat. 9 Geo. 4, c. 15.

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Michaelmas Term in the first year of the reign, &c., it was considered by the said Court of our said lord the King, before the King himself, that the said defendants should take nothing by the said bill or writ, but that their pledges to prosecute should be in mercy, and that the said plaintiff should go thereof without day, as by the record and proceedings thereof, still remaining in the said Court of our said lord the King himself, at Westminster aforesaid, more fully and at large appears; and the said suit was and is thereby ended and determined, to-wit, at Westminster aforesaid, in the county aforesaid." Plea—General issue.

To prove the allegation as to the determination of the suit in which the present plaintiff was arrested, a rule of Court was put in. This rule was of the morrow of St. Martin, 1 Geo. 4; and it was thereby ordered, that the action should be discontinued on payment of costs. The costs had been taxed and paid, but no judgment had ever been entered of record.

Lord TENTERDEN, C. J.—It appears to me that this rule does not shew that there was a judgment of the Court, as stated upon the record.

Denman, C. S., and *Carrington*, for the plaintiff, cited the case of *Bristow v. Haywood* (a).

Lord TENTERDEN, C. J.—The form of the declaration in *Bristow v. Haywood*, does not appear by the report. I should have held, that this rule was *prima facie* evidence of the suit being at an end, if the declaration had been so framed as to meet the case.

(a) 4 Camp. 214. In that case, it was held, that putting in a rule to discontinue the former suit, on payment of costs, and proving the costs taxed and paid, was *prima facie* evidence of the determination

of that suit; but in the case of *Kirk v. French*, 1 Esp. 80, Lord Kenyon held, that putting in a judge's order to stay proceedings on payment of costs, and proof of the payment of those costs, was not

Carrington.—Perhaps your Lordship will think this a case in which leave should be given to amend the record, under the recent stat. 9 Geo. 4, c. 15.

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Lord TENTERDEN, C. J.—It does not appear to me that there is any thing to amend by. This can hardly be said to be an incorrect setting out of a written instrument.

Denman, C. S.—I would submit that there is a sufficient allegation of the determination of the suit, without that part of the declaration which states the judgment of the Court.

Lord TENTERDEN, C. J.—I should be very sorry to stop a case of this kind; and, as my learned Brothers are now sitting, I will take the opportunity of consulting them.

His Lordship then left the Court, to confer with *Bayley*, *Littledale*, and *J. Parke, Js.*, and on his return said, "I have consulted with my learned Brothers, and we are all of opinion, that the proof so entirely varies from the allegation, that I am obliged to nonsuit. In all actions for malicious prosecution, whether founded on a civil or criminal proceeding, you must not only shew the prior proceeding ended, but must shew how. It was contended on the part of the plaintiff, that I might reject the allegation, that there was a judgment, and take the residue of the count without it. That would only leave it, that the parties did not prosecute the suit, but would not shew in what way it was determined. Now, a declaration drawn in that form would be demurrable; but as there can be no demurrer here, I must not permit the plaintiff to go on, rejecting such parts of his declaration as would make the rest insufficient on a demurrer. Again, take it that the declaration states that the defendants did not prosecute their suit, but made default—Would that do? I think not, because the term *default* has a legal meaning. If the de-

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defendant makes a default, he has judgment against him, and if the plaintiff makes default, the judgment is, that he shall take nothing by his bill. Besides this, there is in the present case, not only a difference in form, but in substance. If the judgment be a mere judgment of *nonpros*, which is what is alleged here, the mere judgment is not enough to raise even a presumption of the want of probable cause, as a plaintiff may have that judgment against him, from a mistake or from the negligence of his attorney in not proceeding with sufficient dispatch. In the case of *Sinclair v. Eldred* (a), it was held, that a judgment of *nonpros*, was no proof of a want of probable cause; but in the case of *Nicholson v. Coghill* (b), the Judges all take this distinction, that a judgment of *nonpros* does not shew a want of probable cause, but that a discontinuance is to be considered as *prima facie* evidence of the want of probable cause; the latter is the plaintiff's own act, and the former but an omission. This, therefore, shews that there is in this case not only a variance in form, but in substance, and that the proof would vary according to the mode in which the original action had been determined. I have also asked my brother Judges respecting the point very properly submitted to me as to the amending of the record; and they are of opinion that this is not a case in which I can give leave to amend under the act of Parliament, as this is not the misstating of a written instrument, but the statement of a judgment of the Court, of which there is no proof. I am very sorry for it, but I am bound to call the plaintiff.

Nonsuit.

Denman, C. S., and Carrington, for the plaintiff.

Sir J. Scarlett, for the defendants.

[Attornies— ———, and *Burt, Adlington & Co.*]

(a) 4 Taunt. 7.

(b) 6 D. & R. 12

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*Adjourned Sittings in London, after Michaelmas
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BEFORE LORD TENTERDEN, C. J.

BASHAM v. LUMLEY, Knight.

Jan. 8th.

TRESPASS. The *first* count of the declaration was for false imprisonment, and the *second*, for an assault. Pleas. *First*—General issue. The pleas, from the *second* to the *seventh*, stated, in substance, that the Bermuda Islands were one of his Majesty's colonies, and that the laws of England, in force in England in the year 1612, were in force in those islands, so far as the same were applicable; that the defendant was governor and ordinary, having authority in all matters ecclesiastical there; that the plaintiff had served the office of churchwarden, and having refused to give up his accounts he was cited before the defendant, as Ordinary; and that still refusing to deliver up his accounts, the defendant committed him, as he lawfully might. *Eighth* and *ninth*, that the defendant had committed the trespasses jointly with Alexander Needham, and that the plaintiff had recovered against him for the very same trespasses (a). Replication to the pleas, from the *second* to the *seventh*, de

Semble, that the governor of a British colony has the ecclesiastical power of an ordinary, without that authority being expressly named in his commission.

If a governor of a colony has the authority of the ordinary, he has no power to commit a churchwarden who refuses to account, he ought to proceed upon a citation, and must excommunicate.

(a) As the form of pleading a prior recovery against a cotrespasser, and this species of replication to it, are not to be found in the printed collections, the following forms may be acceptable, more especially, as the learned counsel, by whom these pleadings were respectively settled, have been since promoted to the bench.

Form of the Pleas.

Eighth plea.—And as to the said trespasses in the introductory part of the said second plea mention-

ed, by the said defendant above supposed to have been committed; the said defendant, by like leave of the Court, here says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, that the making the said assault in the said first count mentioned, and the making the said assault in the said last count mentioned, are one and the same assaulting, and that the said seizing and laying hold of the said plaintiff in the said first count mentioned, and the said beating

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injuria; to the *eighth* and *ninth*, that the plaintiff only recovered against Needham for part of the trespasses. Re-

and ill treating the said plaintiff in the said last count mentioned, are one and the same seizing and laying hold of and beating and ill treating; and the said defendant further says, that the said several trespasses in the introductory part of the said second plea mentioned, were done and committed by the said defendant jointly with Alexander Needham. And that, after the committing the said several trespasses, in the introductory part of this plea mentioned and referred to, and before the commencement of this suit, to wit, on the — day of —, —, in his Majesty's Court of King's Bench, in the said Bermuda Islands, the said plaintiff impleaded the said Alexander in a certain plea of trespass, for the committing the very same identical trespasses in the introductory part of this plea mentioned and referred to, his said Majesty's Court of King's Bench in the said Bermuda Islands, then and there having lawful and competent authority, cognizance, and jurisdiction to hold plea of the said trespasses in the introductory part of this plea mentioned and referred to, and such proceedings were thereupon had in his Majesty's said Court of King's Bench in the said Bermuda Islands, in that plea, that afterwards, and before the commencement of this suit, to wit, on the — day of —, —, the said plaintiff, by the consideration and judgment of the said Court of King's Bench in the said Bermuda Islands, recovered in the said plea against the said Alexander

500*l.* for his damages, which he had sustained by reason of the said trespasses in the introductory part of this plea mentioned and referred to; and also of — for his costs and charges by him about his suit in that behalf expended: whereof the said Alexander was convicted.

[And that the said plaintiff, for obtaining execution of the said judgment afterwards, to wit, on the — day of —, —, sued and prosecuted out of his Majesty's said Court of King's Bench in the said Bermuda Islands, a certain writ of our said lord the King, of execution, directed to a certain officer in that behalf, by which said writ of execution the said officer was commanded to take the body of the said Alexander, and also the lands, goods, and chattels of the said Alexander, in execution upon the said judgment, for the said damages and costs so recovered by the said plaintiff against the said Alexander as aforesaid; which said writ of execution, afterwards, and before the commencement of this suit, to wit, on the — day of —, —, was delivered to the said officer to be executed in due form of law, under and by virtue of which said writ of execution the said officer, to whom the said writ of execution was directed, afterwards, and before the commencement of this suit, to wit, on the — day of —, —, seized and took in execution divers goods and chattels of the said Alexander, and thereout levied a certain sum of money, to wit, the

joinder, that the plaintiff recovered for the very same trespasses.

sum of 5*l*., parcel of the damages and costs aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid].

And the said defendant avers, that the said trespasses in the introductory part of this plea mentioned and referred to, and the said trespasses for which the said plaintiff impleaded the said Alexander in his said Majesty's Court of King's Bench, in the said Bermuda Islands, are the very same trespasses, and were committed jointly by the said defendant and the said Alexander, to wit, at London aforesaid, in the parish and ward aforesaid. And this he the said defendant is ready to verify:—wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

The ninth plea was *verbatim* the same, omitting that part between the brackets.

(Signed) *J. Littledale.*

Form of Replication.

And the said plaintiff, as to the said pleas of the said defendant by him eighthly and ninthly above pleaded, saith, that he the said plaintiff, by reason of any thing in those pleas alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, the said defendant; because he saith, that a part only of the said trespasses in the introductory part of the said eighth and ninth pleas referred to, were committed by the said Alexander Needham jointly with the said defendant. And that the said

plaintiff impleaded the said Alexander Needham, and recovered the said judgment against him for such part only of those trespasses in the said Court of King's Bench in the said Bermuda Islands, without this, that the said trespasses, in the introductory part of the said eighth and ninth pleas mentioned and referred to, and the said trespasses for which the said plaintiff impleaded the said Alexander Needham, as in the said eighth and ninth pleas mentioned, were the very same trespasses in manner and form as the said defendant has in those pleas alleged. And this he the said plaintiff is ready to verify:—wherefore he prays judgment, and his damages by him sustained, by reason of the committing of the said trespasses, to be adjudged to him, &c.

(Signed) *J. Parke.*

Rejoinder, that the trespasses were the very same, concluding to the country.

N.B. The way in which only a part of the trespasses were committed by the defendant and Alexander Needham jointly, was this: Sir William Lumley ordered a constable to take the plaintiff into custody, and the constable having done so, the plaintiff was, by the order of Sir William Lumley, transferred into the custody of Needham, who was the gaoler; it therefore follows, that the plaintiff could not have recovered against Needham for any more than the latter part of the trespass. If the plaintiff had recovered against Needham for the whole of the same trespasses, that would

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It appeared, that the plaintiff and a person named Till had been churchwardens of the parish of St. George, in the Bermuda Islands, from Easter, 1820, to Easter, 1821, and that Sir William Lumley was the governor of that colony. It also appeared, that the plaintiff and the other churchwarden had, in the month of June, 1821, refused to deliver up their accounts and pay over their balances to their successors in office, alleging, that they had been allowed a period of sixty days for that purpose by the vestry of the parish; however, it was asserted that that vestry was illegally constituted. It also appeared, that, on the 17th of July, 1821, Sir William Lumley went to the vestry, and gave a summons to a constable, whereby he was ordered to summon the plaintiff and Till "to appear *forthwith*," before the defendant, who was there stated to be governor, commander-in-chief, and ordinary, to be dealt with according to law. It appeared, that the plaintiff refused to obey this summons, and that, by the direction of Sir William Lumley, the constable brought him by force; and that, on the plaintiff and Till both again refusing to deliver up their accounts, they were committed to prison by the defendant, under a warrant, by which the keeper of the prison was directed to keep them without bail or mainprize till they should deliver up their accounts. It was proved, that under this warrant the plaintiff was kept in prison fourteen days, and then discharged.

Upon these facts it was contended, on the part of the plaintiff, that, admitting that the defendant had the ecclesiastical authority of ordinary, still he had no power to imprison, and that, as ordinary, he could only act according to the forms of the ecclesiastical law, and enforce his orders by excommunication.

have been a bar. "In actions in which the damages are uncertain, a recovery and execution against another for the same cause is a bar to another action for the same cause; as in trespass done by several, a recovery and execution

against one is a bar in an action against the others for the same trespass." Com. Dig. tit. Action, (K.4).

"So a recovery is sufficient without execution; for, by the judgment, a matter before uncertain is reduced to a certainty." Ib.

Tindal, S. G., for the defendant.—Even admitting that the defendant was not acting within the letter of his authority, it will be most important for me to shew that he honestly believed he had a right to do as he did. I take the authority of the governor to stand thus: If there be a certain island where there are no inhabitants, and where the possession is entirely vacant, and English subjects go and colonize there, they carry with them such of the then existing English laws as are applicable to their situation. Without some rule of that sort, there would be an entire disunion in the society of every new colony; and it therefore follows, that if no other law is declared for the particular colony, the law of the mother country prevails. With respect to the Bermuda Islands, they were colonized in the year 1612, and being between 200 and 300 leagues distant from the main land of America, they were at that time uninhabited by Indians. The settlers at that time must, therefore, have carried with them not only the English common law, but there must also be the ecclesiastical power of an Ordinary, for there are churches in the Bermuda Islands, and there is a rate for the repair of them; and it is quite clear that some one must have authority to preserve order in them. Now, these things being regulated only by the ecclesiastical law, it must be taken, that the settlers carried with them a certain portion of the ecclesiastical law; and I therefore contend, that the power of administering it resides in the governor, as the representative of his Majesty, who is the supreme head of the English church; and if the governor is Ordinary, he has a right to compel the churchwardens to account. Indeed, independently of this necessity for some person to have the power of the Ordinary, I shall shew, that in one of the local acts of the Legislature of this colony, the governor is called Ordinary, that in another, the fees of his secretary for citations are fixed; and I also shall shew that he grants probates, administrations, and marriage licences; and that, as far back as the year 1689, there were causes in which the grant of letters of adminis-

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tration was contested, which were decided by the governor.

It was proved that the governor granted probates, letters of administration, and marriage licences; and it was also shewn, that, from the year 1689 to 1705, several cases of disputed administration were determined by him.

To shew that the governor had no power as ordinary, the plaintiff's counsel put in his commission as evidence in reply. By this Sir William Lumley was appointed governor, but there was no express grant of any ecclesiastical authority, except a power of collating to ecclesiastical benefices.

Lord TENTERDEN, C. J.—How does he get his power in testamentary cases.

Sir J. Scarlett.—By an act of the local legislature passed in the year 1787.

Lord TENTERDEN, C. J.—But the governors acted before.

Sir J. Scarlett.—Perhaps the commissions of former governors might give greater power.

The local act passed in the year 1787 was read. It was an act to regulate the governor's power to grant administration of the effects of intestates (a).

Tindal, S. G.—I submit, that the governor of a British colony is ordinary *virtute officii*, and it needs no more to be inserted in his commission than his power of administering the common law. With respect to the collation to benefices, as that is a part of the prerogative of the crown, it was considered necessary that that should be inserted in the commission.

(a) This local act was a copy almost *verbatim* from the stat. 22 & 23 Car. 2, c. 10.

Sir *J. Scarlett*, in reply.—I deny that the governor is *ipso facto* the ordinary in this colony; and if, in former times, he acted in testamentary causes, that proves nothing, because former governors might have had the power given them by the commissions under which they acted, or by the written instructions given to governors when they go out, which written instructions are always given in aid of the commission; and if any person is authorized to act by written instructions, he cannot go beyond such instructions.

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Lord TENTERDEN, C. J.—The only justification upon which any evidence has been offered in substance, amounts to this, that the defendant did the acts complained of in his character of ordinary of these islands, and that he therefore is justified. There has been some discussion at the bar, whether the defendant is ordinary or not. It does not appear to me to be necessary that I should give a decided opinion upon that point, but I should rather think that the governor of this colony is possessed of that authority. His commission gives him authority as governor; one act of the Legislature there regulates his jurisdiction in cases of intestacies, and another prescribes the fees to be taken in certain cases, which are applicable to the duty of the ordinary; these acts, therefore, evidently treat him as having the jurisdiction of ordinary, and unless he had some authority, all probates and all marriage licences that he has ever granted are totally void; and though there is nothing in the commission that particularly relates to the power of ordinary, yet I think that his general authority as governor embraces it. However, I do not decide the point, and I think it better that I should abstain from doing so; but even supposing that this defendant had this authority, he must exercise it in a legal manner; and if he has not done so, his justification fails. Now, here, it appears that the defendant ordered the plaintiff to be brought before him; and because he refused

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to deliver up the books, the defendant committed him to prison. These acts the law will not justify, because, although the defendant might be an ecclesiastical judge, still, to be justified in his acts, he must proceed by a regular citation, and even then an ecclesiastical judge cannot commit, he can only excommunicate. The plaintiff is therefore entitled to a verdict.

Verdict for plaintiff.—Damages, 1000*l*.

Sir J.^r Scarlett, and Alderson, for the plaintiff.

Tindal, S. G., Gurney, and Justice, for the defendant.

[Attornies—Adlington & Co., and Fownes & Co.]

Jan. 9th.

BAIN v. CASE.

In *assumpsit*, on a policy of insurance, the Jury ought not to allow the plaintiff interest, unless evidence be given that he had applied to the underwriter, to settle the loss, soon after it happened, and notified to him the ground of such application.

Lloyd's list is evidence against the assured, if it be shown that the broker had read it, before the policy was effected. A ship staid at a particular port, for a period of one hundred and nine days, and whether this was an unreasonable time, was held to be a question of fact for the Jury.

ASSUMPSIT on a policy of insurance on one-third of the brig *Nancy*, lost or not lost from the 22d day of January, at all or any ports and places in the Northern and Southern Pacific Ocean, Rio de Janiero, Gibraltar, and Malta, all or any of them. The *first* count stated a loss by pirates, the *second* by a capture by persons unknown.

The loss was in fact by the vessel being seized by the patriot authorities at Pisco, previous to the time when the Chilian government was recognized by this country.

The first ground of defence was, that there was a concealment on the part of the assured; for that the Chilian government had declared the coast of Peru to be in a state of blockade, from 22 deg. 48 min., to 2 deg. 12 min. south, and that all vessels with false or double papers were to be considered as enemies' property. This had been notified in Lloyd's list on 26th December, 1820, and it was alleged that this vessel had double papers, which was a circumstance not communicated to the underwriters. Another ground of defence was, that the vessel had remained one hundred and nine days at the port of St. Blas, which was alleged to be an unreasonable time. However,

it was stated by the captain, that he stayed in the hope of getting permission to land his cargo, as negotiations were pending with the government there, for permission for him to do so.

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To make out the first ground of defence, the broker, through whom the policy was effected, was asked to produce Lloyd's list.

F. Pollock, for the plaintiff, objected that Lloyd's list was not evidence.

Lord TENTERDEN, C. J.—I believe Lloyd's list has been admitted in evidence, as against the underwriters, but has it ever been given in evidence against the assured?

Sir J. Scarlett.—The broker will prove that he knew of this declaration of blockade before the present policy was effected.

Lord TENTERDEN, C. J.—That, I think, makes it evidence.

The broker stated, that he had read this announcement in Lloyd's list, before the effecting of the policy. The declaration of the blockade was read from Lloyd's list, but it could not be made out that the vessel had double papers.

Lord TENTERDEN C. J., (in summing up)—It is said, that this policy was put an end to, by the vessel's staying at St. Blas for one hundred and nine days, because that was an unreasonable time. Whether it was an unreasonable time is a question of fact.

Verdict for the plaintiff.

The Jury wished to know whether they ought to give interest; the plaintiff's counsel having asked them to allow

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interest to the plaintiff in the shape of damages, on the ground that the loss had happened so long back as the year 1822.

Lord TENTERDEN, C. J.—(to the Jury)—On the subject of interest, I intended to make some observations to you, after you had given your verdict. I think you cannot allow it in the present case. I am of opinion that the assured cannot recover interest, (which it is in many cases very desirable that he should), unless he has made a distinct application to the insurer, to pay the amount of the loss, and has notified to him the ground of such his application.

F. Pollock, and R. V. Richards, for the plaintiff.

Sir J. Scarlett, Campbell, and Chitty, for the defendant.

[Attornies—*Davies & R., and Blackstock & B.*]

Jan. 12th.

REX v. MUNTON.

To support an indictment for perjury committed on a trial at the Quarter Sessions, three witnesses who heard the party examined, stated what he swore on that trial; and the party was convicted, although neither of the witnesses took down the evidence as it was given, and neither of them professed to state the whole of the evidence that he gave.

PERJURY. The indictment charged the defendant with having falsely sworn, on the trial of an indictment, at the London Sessions, that Mr. Michael Pearson had committed an assault upon him, and upon this the perjury was assigned. Plea—Not Guilty.

To prove what the defendant swore on the trial, at the London Sessions, Mr. Pearson, the prosecutor, Mr. Field, his attorney, and Mr. Fellowes, his partner, were called. They all heard the defendant examined, but neither of them had taken any notes of the evidence, as it was given. The prosecutor had, on the evening of the day on which

To shew that the perjury was wilful and corrupt, evidence may be given of expressions of malice used by the party towards the person against whom he gave the false evidence.

the trial at the Sessions took place, made a memorandum of what the defendant had sworn. Mr. Field had also made another memorandum of it, either on the same night, or the next morning, but this he had destroyed on seeing that the prosecutor's memorandum was more complete than his. Mr. Fellowes spoke from memory only. Neither of these witnesses professed to give the whole of what the defendant swore at the Sessions, and they stated that the giving of his evidence occupied an hour.

To shew that it was false, several witnesses proved, that the prosecutor was at a distant part of the town at the time when the supposed assault was charged to have been committed.

To shew that the defendant had wilfully and corruptly sworn to what was not true, three witnesses were called, who proved, that between the times of the alleged assault and the trial at the London Sessions, they heard the defendant use expressions of malice towards the prosecutor.

The defence was, that the defendant had sworn falsely by mistake.

Lord TENTERDEN, C. J., left it to the Jury to say, whether the defendant had wilfully and corruptly sworn to that which was false, or whether he had been mistaken.

Verdict Guilty.

Sir *J. Scarlett*, *Starkie*, and *Crompton*, for the prosecution.

Tindal, S. G., *Denman*, C. S., and *Patteson*, for the defendant.

[Attornies—*Sharp & Field*, and *Newman*.]

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*Further Adjourned Sittings at Westminster, after
Michaelmas Term, 1828.*

BEFORE LORD TENTERDEN, C. J.

Jan. 14th.

PAUL, Bart., Assignee of RICH, Bart. v. DOWLING.

The making of bricks for sale, from clay taken from a man's own land, does not constitute him a trader, within the meaning of the bankrupt laws; nor will it be a trading, if such person buy chalk for the purpose of burning with the clay, to improve the bricks, and afterwards sell a portion of the chalk, when converted into lime.

TROVER, for furniture. Plea—General issue. The whole question was, whether Sir Charles Henry Rich, Bart., was a trader within the meaning of the bankrupt laws, by reason of his having sold lime. It appeared that on the death of his father, in the month of September, 1824, Sir C. H. Rich came into the possession of a brick kiln, and that at that kiln bricks were made for sale from earth taken from Sir C. H. Rich's own land. It also appeared, that, where the bricks were burnt, chalk was burnt with them, and it was distinctly proved, that it was the practice in the county of Berks, in which this kiln was situate, to put chalk with the bricks, with a view of improving their quality, although it appeared that bricks could be made without it. This chalk was purchased by Sir C. Rich; and it appeared that a great proportion of it, when burnt and converted into lime, was used by him in some extensive repairs at his mansion and farm buildings; however, it was shewn, that about thirty bushels of it were sold by him, at 9d. *per* bushel, principally to his own tenants, who got it of him as matter of favour; but, it was proved, that in two or three instances, lime was sold to strangers, upon their mere application at the kiln.

Sir *J. Scarlett*, for the defendant.—If a gentleman, having a landed estate, is doing repairs, and he buys chalk and burns it into lime, the greater part of which is used by himself, and the surplus sold; this I conceive to be

no trading, because it is merely incidental to the enjoyment of his estate, and because he does not seek his living by buying and selling. Again, if the owner of lands burn bricks from earth taken from his own estate, and buy chalk to burn with them, such chalk being necessary for the burning of the bricks, he will not become a trader, though he may sell any part of the lime that he does not want; for, if the occupier of lands purchase any commodity, for the purposes of his occupation, he may sell the surplus that he does not want for his own use, without becoming a trader within the meaning of the bankrupt laws; and with respect to making bricks from one's own land, for the purpose of sale, that is, by itself, clearly not a trading.

LORD TENTERDEN, C. J.—If the owner of lands make bricks from his own earth, taken from his own land, and sell those bricks, he is not a trader within the meaning of the bankrupt laws; however, if a person buy chalk, and convert it into lime for the purpose of selling it and making a profit of it in that state, it is equally clear that he is a trader. With respect to the present case, I am of opinion, in point of law, that, though Sir C. H. Rich bought chalk, and burnt it into lime, and sold it, yet if he did that as a mode which was considered best for using his brick earth, that is not a trading; and that, if a person buy a commodity for the carrying on of another business, and afterwards sell some of it, that will not make him a trader in that commodity; and in this case, before you can say, that Sir C. H. Rich was a trader, you must be satisfied that he carried on the business of a burner of lime, with a view of making a profit of that business. And I think we must not inquire very nicely, whether it was necessary to use chalk in the burning of bricks; for I think that if it was only considered to be most expedient to use chalk in the burning of bricks, and that the lime was not in fact burnt for the purpose of making a distinct profit by it, that then it is no trading. A question has been raised, whether this

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clay required to have chalk burnt with it, and perhaps, in strictness, it might be considered that chalk was unnecessary; however, I am of opinion, that if this chalk was really burnt for the sake of the bricks, you ought not to say that there was a trading. The question therefore is this, was this chalk bought for the more convenient making of the earth into bricks; or was it bought by Sir C. H. Rich, for the purpose of using it in a double trade of lime burning and brick making, which was carried on by him with a view of deriving a separate profit from each.

Verdict for the defendant; and the foreman of the Jury, added:—"We find that there was no trading."

Gurney, Denman, C. S., and Manning, for the plaintiff.

Sir J. Scarlett, and *Smirke*, for the defendant.

[Attornies—*Yatman*, and *Sandys & Co.*]

The cases on this subject will be found collected in *Arch. Bank. Law*, pp. 26, *et seq.*

Jan. 14th.

LEWIS and Another v. DAVIS.

If the shearing of cloth from list to list by shears be known, and the shearing it from end to end by means of rotary cutters be also

CASE, for the infringement of a patent, for a machine for shearing woollen cloths. Plea—General issue.

The patent to the plaintiffs was dated 15th January, 1818, and it was for "improvements of a machine for shear-

known, and a person construct a machine to shear from list to list by means of rotary cutters; this is a new invention, and will entitle the inventor to maintain a patent for it.

If A., in 1818, take out a patent for "improvements in a machine for which J. L. took out a patent in 1815," it is necessary for A., on the trial of an action for the infringement of his patent, to put in J. L.'s patent and specification; but it is not material whether a machine made according to the specification of J. L. would be useful or not, if it be shewn that a machine constructed according to A.'s specification would be so.

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ing and cropping woollen cloths, the same being improvements on a machine for which John Lewis had obtained a patent on the 27th of July, 1815." The plaintiffs' specification was put in; it was dated 14th July, 1818, and it stated: "We claim, as our invention,—*First*, the application of the flat spring for directing and pressing the cloth to the cutting edges;—*Second*, the application of the triangular steel wire on the cylinder;—*Third*, a proper substance to brush the cloth;—*Fourth*, to shear with rotary cutters from list to list, in the manner specified."

F. Pollock, for the defendant.—As these are alleged to be improvements on a former machine, for which a patent was granted in the year 1815, the specification of that patent must be produced. How can the Jury say that these are improvements, without they know what the original machine was?

Rotch, for the plaintiffs.—I submit, that that is unnecessary, because the plaintiffs' specification is perfect; any one who reads that may make the machine without looking to any earlier specification.

Lord TENTERDEN, C. J.—When these parties applied to the Crown in the year 1818, they might have applied for a patent for their invention without reference to any thing that had gone before. Now, that they have not done; on the contrary, they profess to have improved a machine already known. That machine may be used by any one after fourteen years from the earlier patent, but any new matter which is included in the present patent is not open to every body till fourteen years from a later period. It is, therefore, material to shew what are the improvements contained in the plaintiffs' patent. Now, I cannot say what are improvements upon a given thing, without knowing

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what that thing was before; for aught I know, all the things mentioned in the plaintiffs' specification may have been included in the former specification.

The specification of the patent of 1815 was read. That was for a machine with rotary cutters, which were to shear the cloth from end to end.

It appeared, that the defendant's alleged infringement of the patent consisted in making a machine with rotary cutters, to shear from list to list, but that he had not used either the 1st, 2nd, or 3rd of the improvements stated in the plaintiffs' specification. It was also proved, that shearing from list to list, by machinery to carry shears, was known before the date of the plaintiffs' patent; and also that rotary cutters to shear the cloth from end to end were known before that time. It was proved, that the plaintiffs' improvements were all useful.

F. Pollock, for the defendant.—The old mode of shearing was from list to list, by machinery to carry shears in that way. The plaintiffs have combined a rotary cutter, which was a thing well known before, with three other things which the defendant has not infringed upon. Now I submit, that the rotary cutter being old, we had a right to use it in shearing from list to list, which was the old way of shearing by means of shears, though perhaps rotary cutters had only been used in shearing from end to end. The defendant has not infringed on any of the three things which the plaintiffs claim. The plaintiffs have no right to claim the going from list to list as his invention, and we have only sheared in that way with a rotary cutter instead of shears, that species of cutter being old, and not of the plaintiffs' invention.

Lord TENTERDEN, C. J.—It is not material whether a machine made under the patent of 1815 is useful or not,

as it is shewn that the plaintiffs' machine is highly useful. The case stands thus: it appears that a rotary cutter to shear from end to end was known, and that cutting from list to list by means of shears was also known. However, if, before the plaintiffs' patent, the cutting from list to list, and the doing that by means of rotary cutters, were not combined, I am of opinion, that this is such an invention by the plaintiffs as will entitle them to maintain the present action.

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Verdict for the plaintiffs.—Damages, 1*s*.

Sir *J. Scarlett, Brougham, Campbell, and Rotch*, for the plaintiffs.

F. Pollock, Denman, C. S., and Platt, for the defendant.

[Attornies—*Adlington & Co.*, and *T. White.*]

IN the ensuing Term, *F. Pollock* moved for a new trial on affidavits, but no question was made as to either of the points decided at the trial.

COTTON v. JAMES, Gent., one, &c.

Jan. 18*th*.

TRESPASS. The *first* count of the declaration was for breaking and entering the plaintiff's house, and taking his goods;—*Second* count, for taking and carrying away
In trespass for taking goods, the defendant pleaded (without the general issue) a justification under the
 warrant of commissioners of bankrupt, and averred, that the plaintiff "had become bankrupt within the true intent and meaning of the stat. 6 Geo. 4, c. 16." Replication, denying that the plaintiff became bankrupt:—*Held*, that on these pleadings the defendant had the right to begin.
 If a plea contain distinct allegations of a trading and petitioning creditor's debt and then go on to state, that the plaintiff "became bankrupt," and in the replication the plaintiff protest the trading and petitioning creditor's debt, and deny that the plaintiff "became bankrupt," this merely puts in issue the act of bankruptcy, and the words "became bankrupt," coupled with the other two allegations, will be held to extend to the act of bankruptcy only.

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the goods and converting them. Plea (a)—That before the time when, &c. the plaintiff was a trader, and became indebted to the defendant in a sum upwards of 100*l*., and that he “became a bankrupt within the true intent and meaning of the statute,” then and still in force concerning bankrupts. That the defendant petitioned the Lord Chancellor, and that a commission issued, upon which the plaintiff was declared a bankrupt, whereupon the commissioners granted their warrant, directed to Charles Cutten, their messenger, to seize, &c.; and that he did so seize, &c. The plea went on to state, that the trespasses were committed before the choice of an assignee, and that the defendant was the petitioning creditor. Replication, protesting the petitioning creditor’s debt, the trading, the commission and adjudication, and the warrant, and denying that the plaintiff “did become a bankrupt within the true intent and meaning of the said statute (b).”

(a) There was no plea of the general issue. It seems that, under sect. 44 of the bankrupt act, 6 Geo. 4, c. 16, a plea of the general issue would have been sufficient without any special plea; and that the defendant chose to plead specially, merely for the purpose of obtaining the reply.

(b) By sect. 27 of the bankrupt act, 6 Geo. 4, c. 16, the commissioners may grant a warrant to the messenger to break open any house, &c. where any property of the bankrupt shall be reputed to be, and to seize it; and by sect. 31, no action shall be brought against the messenger for any thing done under the commissioners’ warrant, prior to the choice of assignees, unless perusal and a copy of the warrant have been demanded; and if such demand has

been complied with, the petitioning creditor must be made defendant in any action brought for any thing done under the warrant. These sections of the bankrupt act are set out in Arch. Bank. Law, pp. xxxii, xxxiii.

As these forms of plea and replication are not to be found in any printed collection, copies of them will no doubt be acceptable; more especially as in the plea there is a statement of the trading, commission, &c. in the proper form under the new bankrupt act, which will be found useful in drawing a plea by a bankrupt who has obtained his certificate after action brought, as well as in cases like the present.

Plea.—And the said defendant, in his own proper person, comes and defends the force and injury

As soon as the pleadings had been opened, *F. Pollock*, for the defendant, claimed the right to begin, as the

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when, &c., and says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, that the said goods, chattels, and effects in the said first count of the said declaration mentioned, and the said goods, chattels, and effects in the said second count mentioned, are and were one and the same goods, chattels, and effects, and not other or different; and that the seizing and taking, &c. of the said goods, chattels, and effects in the said first count mentioned, and the seizing and taking, &c. in the said second count mentioned, are and were one and the same seizing and taking, and not other or different. And the said defendant further saith, that long before, and continually thence until, and at the time of the suing out of the commission of bankrupt hereinafter mentioned, and thence until the time of committing the said supposed trespasses in the said declaration mentioned, the said plaintiff was a builder and trader, within the true intent and meaning of the statute made, and then and still in force concerning bankrupts, to wit, at the parish aforesaid, in the county aforesaid, and during all the time aforesaid, there sought his livelihood thereby. And the said plaintiff so being a builder and trader as aforesaid, and so seeking his livelihood as aforesaid, afterwards, to wit, on the 8th day of January, in the year of our Lord 1828 afore-

said, at the parish aforesaid, in the county aforesaid, became and was indebted in the way of his said trade to the said defendant, a subject of this realm, in a certain sum upwards of 100*l*, to wit, in the sum of 218*l*. 19*s*. of lawful money of Great Britain, for a true and just debt due and owing from the said plaintiff to the said defendant. And the said plaintiff being so indebted, and being such builder, and so seeking his livelihood as aforesaid, and being a subject of this realm, he, the said plaintiff, afterwards and before the issuing of the commission hereinafter mentioned, to wit, on the 10th day of October, in the year aforesaid, at the parish aforesaid, in the county aforesaid, became a bankrupt within the true intent and meaning of the said statute made and in force concerning bankrupts. And the said defendant so being a creditor of the said plaintiff, and being wholly unsatisfied and unpaid his said debt, he, the said defendant, afterwards, to wit, on the 16th day of October, in the year aforesaid, at the parish aforesaid, in the county aforesaid, duly presented his certain petition in writing, according to the form and effect of the said statute, to the Right Honourable Lord Lyndhurst, then and now being Lord High Chancellor of Great Britain, praying him to grant unto the said defendant, his Majesty's commission of bankrupt, as by the said petition, reference being thereunto

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affirmative was on the defendant. And he relied on the case of *Cooper v. Wakley*, ante, p. 474.

had, will more fully appear. And the said defendant avers, that he then and there, and before the commission was granted, duly made the affidavit, and gave bond to the said Lord Chancellor according to the directions of the said statute. Whereupon afterwards, to wit, on said 16th day of October, in the year aforesaid, to wit, at the parish aforesaid, in the county aforesaid, a certain commission of bankrupt, under and sealed with the Great Seal of Great Britain, bearing date at Westminster, the day and year last aforesaid, grounded upon the said statute and petition of the said defendant, was duly awarded and issued against the said plaintiff, directed to certain commissioners therein named, to wit, Archibald Elijah Impey, Montague Farrer Ainslie, William Villiers Surtees, Robert Grant, and Charles Bathurst, Esqrs., whereby the said lord the King named, assigned, appointed, constituted, and ordained them his special commissioners, and thereby gave full power and authority to them four, or three of them, to proceed according to the said statute, and to take such order and direction, with the body of the said plaintiff, as also with all his lands, tenements, and hereditaments, both within this realm and abroad, as well copy or customaryhold as freehold, which he had in his own right before he became bankrupt; as also, with all such interest in any such lands, tenements, and

hereditaments as the said plaintiff might lawfully depart withal, and with all his money, fees, offices, annuities, goods, chattels, wares, merchandizes, and debts, wheresoever they might be found or known, and to make sale thereof, or otherwise order the same for satisfaction and payment of the creditors of the said plaintiff, and to do and execute all and every thing and things whatsoever towards and for all other intents and purposes, according to the ordinance and provision of the said statute, commanding them the said commissioners, four or three of them, to proceed to the execution and accomplishment of the said commission, according to the true intent and meaning of the same statute, with all diligence and effect, as by the said commission, duly entered of record in the proper office for that purpose, will more fully appear; which said commission is still in full force and effect. And the said defendant further saith, that the said commission being delivered to the said commissioners by virtue thereof, and by force of the said statute, the said Archibald Elijah Impey, William Villiers Surtees, and Charles Bathurst, three of the said commissioners in the said commission named, afterwards, to wit, on the 24th day of October, in the year aforesaid, the due proof being made in that behalf, adjudged and declared the said plaintiff to have been and to become a bankrupt before the issuing of

Sir J. Scarlett, *contra*.—This case is distinguishable from that of *Cooper v. Wakley*. In that case, which was

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the said commission, and at the time of the issuing thereof to be a bankrupt within the true intent and meaning of the statute made and then in force concerning bankrupts, to wit, at the parish aforesaid. And the said defendant further says, that, afterwards, to wit, on the said 24th day of October, in the year aforesaid, to wit, at the parish aforesaid, the said Archibald Elijah Impey, William Villiers Surtees, and Charles Bathurst, three of the said commissioners, under and by virtue of the said commission, and by force of the said statute, made their certain warrant in writing, under their respective hands and seals, directed to Charles Cutten, their messenger, and his assistant, and also to all mayors, bailiffs, constables, headboroughs, and all other his Majesty's loving subjects, whom they the said commissioners required to be aiding and assisting in the execution thereof, as occasion should require; and by which said warrant they the said commissioners required, authorized, and empowered them, and every one of them, forthwith to enter into and open the house and houses of the said plaintiff, and also into all other place and places belonging to him the said plaintiff, where any of his goods were or were suspected to be, and should there seize all the ready money, jewels, plate, household stuff, goods, merchandizes, books of account, and all other things whatsoever belonging to him the

said plaintiff; and such things as he should so seize he should cause to be inventoried and appraised by honest men of skill and judgment, and the same he should return to them the said commissioners, with all convenient speed, and what he should so seize he should safely detain and keep in his possession until they the said commissioners should give him order for the disposal thereof; and in case of resistance, or of not having the key or keys of any door or lock belonging to him the said plaintiff, where any of his goods were or were suspected to be, that he should break open, or cause the same to be broken open, for the better execution of that their warrant, which said warrant afterwards, and before the said several times when, &c., to wit, on the day and year last aforesaid, was delivered to the said Charles Cutten, so being such messenger as aforesaid, to be executed in due form of law. By virtue of which said warrant, and by force of the said statute, the said Charles Cutten so being such messenger as aforesaid, at the said several times when, &c. peaceably and quietly entered into the said dwelling house, in which, &c. in order to seize and take, and did seize and take, the said goods, chattels, and effects of the said plaintiff in the said declaration mentioned, the same then being in the said dwelling-house, for the purpose in the said warrant mentioned, and hath from thence hitherto kept and de-

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an action for a libel, the publication was admitted on the record, and if the defendant failed in proving his justifica-

tained the same under and by virtue of such statute, commission, and warrant as aforesaid; and in so doing, he the said Charles Cutten, so being such messenger as aforesaid, did necessarily and unavoidably make a little noise and disturbance in the said dwelling-house; and because he had not and could not procure from the said plaintiff or any other person whatsoever the keys of the said doors and locks in the said declaration mentioned, he the said Charles Cutten was obliged to force and break open the same, and the staples and hinges thereof, in order to seize certain of the said goods and effects then being within the said doors, as he lawfully might for the cause aforesaid, doing no unnecessary damage to the said plaintiff on the said occasions, which are the said several supposed trespasses, whereof the said plaintiff hath above thereof complained against him the said defendant. And the said defendant avers that the said supposed trespasses were done and committed previous to the choice of an assignee, and that he the said defendant was the petitioning creditor for the said commission. And this he the said defendant is ready to verify; wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

(Signed) *Samuel Comyn.*

Replication. — And the said plaintiff saith, that he, by reason

of any thing by the said defendant in his said plea above alleged, ought not to be barred from having or maintaining his aforesaid action thereof against him the said defendant. Because, protesting that he the said plaintiff was not at the said times in the said plea mentioned, or at any other time before the suing out the said supposed commission of bankrupt in the said plea mentioned, a builder or trader within the true intent and meaning of the said statute made and then and still in force concerning bankrupts. And also protesting that he the said plaintiff did not, at the said time in the said plea in that behalf mentioned, or at any other time before or since, become, nor was he indebted, in the way of his said supposed trade or otherwise, to the said defendant in the sum of 218*l.* 19*s.* in the said plea mentioned, nor in any other sum of money whatsoever, for a true and just debt owing from the said plaintiff to the said defendant. And also protesting that no such commission of bankrupt, as in the said plea mentioned, ever was awarded or issued against him the said plaintiff in manner and form as in the said plea above respectively mentioned and set forth. And also protesting that the said commissioners in the said plea mentioned, or any of them, did not adjudge or declare the said plaintiff to have been and become a bankrupt before the issuing of the said supposed commission in the said

tions, it was not incumbent upon the plaintiff to give any evidence whatever, and his counsel need only address the Jury on the amount of damages. Now, here, the plaintiff must call witnesses, because, although the committing of a trespass is certainly admitted on the record, yet, as goods were taken, the plaintiff is obliged to go into evidence as to the number and value of those goods. I therefore submit, that the plaintiff is entitled to begin, for the purpose of shewing what goods were taken, and also their value.

Lord TENTERDEN, C. J., held, that on these pleadings the defendant was entitled to begin.

F. Pollock, for the defendant, addressed the Jury and called his witnesses.

The plaintiff's counsel contended, that, as the issue was, whether the plaintiff "became a bankrupt," it was incumbent on the defendant to shew that the plaintiff was a trader, and that there was a good petitioning creditor's debt, as well as to shew an act of bankruptcy; for that the allegation, that a party became a bankrupt, was not made out, without proof of a trading and a petitioning creditor's debt, as well as of an act of bankruptcy.

plea mentioned, or to be at the time of the issuing thereof a bankrupt, within the true intent and meaning of the said statute concerning bankrupts, as in the said plea mentioned. And also protesting that the said Archibald Elijah Impey, William Villiers Surtees, and Charles Bathurst, or any or either of them, did not make or deliver any such warrant in writing in manner and form as in the said plea above in that behalf respectively alleged. For replication, nevertheless, in this behalf, the said plaintiff saith, that he

the said plaintiff did not, at the said time in the said plea in that behalf mentioned, or at any other time, become a bankrupt within the true intent and meaning of the said statute, in manner and form as he the said defendant hath above in his said plea in that behalf alleged. And this he the said plaintiff prays may be inquired of by the country, &c.

(Signed) *F. Kelly.*

And the said defendant doth the like.

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LORD TENTERDEN, C. J.—As there are separate allegations as to the trading and petitioning creditor's debt, I shall hold, that this issue merely goes to the act of bankruptcy.

The defendant's witnesses not making out a sufficient act of bankruptcy—

Sir *J. Scarlett*, at the conclusion of the defendant's case, addressed the Jury for the plaintiff, and called witnesses to shew the amount of damages, and—

F. Pollock, for the defendant, replied.

Verdict for the plaintiff.—Damages, 400*l*.

Sir *J. Scarlett*, *Brougham*, and *Kelly*, for the plaintiff.

F. Pollock, *Denman*, C. S., and *Comyn*, for the defendant.

[Attornies—*Winter & Son*, and *James*,]

IN the ensuing Term, *F. Pollock* obtained a rule nisi for a new trial, on the ground that the damages were excessive.

Jan 19th.

VESSEY v. PIKE.

In an action for a libel, the defendant cannot, under the general issue, give evidence of any fact in mitigation of damages, which would be evidence to prove a justification of any part of the libel. He ought to justify as to that part.

LIBEL. Plea—General issue. The libel, which was published in a newspaper, called the *Derby Reporter*, professed to give an account of an examination, touching an order of filiation.

Denman, C. S., for the defendant, wished, in mitigation of damages, to adduce evidence of what really passed on the examination.

Lord TENTERDEN, C. J.—You are not at liberty to give evidence, in mitigation of damages, of any fact, which would be evidence to prove a justification of any part of the libel, because you ought to have justified as to that part.

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The evidence was not given.

Verdict for the plaintiff. Damages—1*s*.

Brougham, and *Busby*, for the plaintiff.

Denman, C. S., and *Kelly*, for the defendant.

[Attornies—*J. Vessey*, and *Few & Co.*]

CROSSLEY v. BEVERLEY.

Jan. 20*th*.

CASE, for the infringement of a patent, for making an improved gas apparatus. Plea—General issue. The patent, which was dated December 9*th*, 1815, had been granted to Mr. Samuel Clegg, and by him assigned to the plaintiff.

The specification, which was dated June 8*th*, 1816, stated as follows, “my *improved gas apparatus* is for the purposes of extracting inflammable gas by heat, from pit-coal, tar, or *any other substance from which gas or gases, capable of being employed for illumination, can be extracted by heat*, for purifying the gas so obtained, and for measuring it out, and distributing it to lamps, lights, or burners, where light or heat is to be produced by the

If one take out a patent, and in his specification state certain improvements in the mechanical parts of his apparatus, which it appears he has invented after the taking out of the patent: this will not invalidate the patent, as the public ought to have the advantage of all improvements down to the time of the specification.

A specification of an invention,

for which a patent had been granted, stated the invention to be an improved apparatus to extract gas from pit-coal, tar, or *any other substance from which gas, capable of being used for illumination, could be extracted by heat*:—*Held*, that the words ‘other substance’ must mean substance *ejusdem generis*, and that oil was not meant to be included in it, it being shewn, that, at the time in question, oil was considered much too expensive to be used for the making of gas for the lighting of streets and buildings, though it was known to afford an inflammable gas.

If in the specification of an improved gas apparatus no direction is given respecting a condenser, which is a necessary part of every gas apparatus; this will not invalidate the patent, if it appear, that every one capable of constructing a gas apparatus must know that a condenser must form a part of it.

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combustion of the said gas." The specification then went on to describe a horizontal flat retort, a purifying apparatus, a gauge or rotative gas-meter, and a self acting governor.

It was proved by Mr. Farey, who was called for the plaintiff, that this apparatus would not succeed in making gas from oil; and he stated, that it was known, at the date of the specification, that oil, resins, and all other substances which burn with a flame, would yield an inflammable gas, but that, from the great expense of oil, no one then thought that it could ever be useful to light either streets or buildings; and the witness added, that though oil gas had been since used to light some particular places, yet it still continued doubtful, whether oil gas would keep its ground, by reason of the great expense of the oil.

Brougham, for the defendant.—This patent is for a machine to make gas from pit coal, tar, or any other substance. Now it appears that it will not do for oil.

LORD TENTERDEN, C. J.—In reading this specification, it is clear, that the words "other substance," coupled with the words "pit coal and tar," mean other substance *ejusdem generis*.

Brougham.—The patent is for gas to be produced from pit coal, tar, or any other substance which produces an inflammable gas. Now that is certainly the case with oil.

LORD TENTERDEN, C. J.—One must understand this person to speak of those things which were known and used at the time. He could not possibly mean oil gas, it had never been used, because of the great expense; and this man must really have had the spirit of prophecy, to have found out that oil gas ever was to be employed in lighting the streets.

Brougham.—There is nothing to prevent a person who

sees this specification from considering that oil gas was meant to be included in it, as it was well known that it was possible to produce gas from oil.

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Lord TENTERDEN, C. J.—I must understand this party to speak as a practical man, and to speak with reference to those things that were then known and in use.

It appeared from the evidence that the specification did not give any directions respecting a condenser, which was well known to be an essential part of every gas apparatus.

Brougham, for the defendant.—The things comprised in the specification will not make a gas apparatus. It will be incomplete for want of a condenser.

Lord TENTERDEN, C. J.—A workman who is capable of making a gas apparatus, would know that he must put that in.

Brougham.—The specification does not direct it to be put in.

Lord TENTERDEN, C. J.—No, but it does not tell you to leave it out. There is nothing in that.

The inventor, Mr. Clegg, was called, and he stated in his cross-examination, that he had invented some of the mechanical parts of the apparatus, which were described in the specification, at times subsequent to the taking out of the patent; he, however, also stated, that before the patent was taken out, he had in his mind a general idea of the whole apparatus.

Brougham, for the defendant, then went to the Jury, on the following grounds, *first*, that the specification was

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not sufficiently explicit, as the description of the retort was defective; *secondly*, that one part of the invention was not useful (*a*); *thirdly*, that Mr. Clegg had invented certain parts of the apparatus described in the specification, at times subsequent to the taking out of the patent.

Lord TENTERDEN, C. J., began to sum up the evidence, but the Jury expressed themselves satisfied, and found a

Verdict for the plaintiff.

Sir J. Scarlett, F. Pollock, Alderson, and Godson, for the plaintiff.

Brougham, Rotch, and Patteson, for the defendant.

[Attornies—Burra & N., and Smithson & Co.]

IN the ensuing Term, *Brougham* moved for a rule *nisi*, for a new trial; and he argued, that, as Mr. Clegg invented certain parts of the apparatus described in the specification at times subsequent to the taking out of the patent, it must be taken that the specification was of an invention different from that for which the patent was taken out, and that the patent was therefore void.

Lord TENTERDEN, C. J.—It appears that the person's

(*a*) In the case of *Hill v. Thompson*, 8 Taunt. 401, *Dallas, J.*, in delivering the judgment of the Court, says, "If any part of the alleged discovery, being a material part, fail, (the discovery in its entirety forming one entire consideration), the patent is altogether void; and to this point, which is so clear, it is unnecessary to cite cases." In the case of *Brunton v.*

Hawkes and Others, 4 B. & A. 541, it was held, that a patent for improvements in the construction of anchors, windlasses, and chain cables, could not be supported, unless there were novelty in each invention; and it appearing that there was no novelty in the construction of the anchors, the Court held, that the patent was wholly void.

mind was directed to the invention, and that, in the interval between the taking out of the patent and the enrolling of the specification, he perfects it in some of the mechanical parts. The question is, will that make his patent void? No case has so decided, and it would be a very great hardship if it were so. Indeed, I do not see why any time is allowed to the inventor to prepare his specification, unless it be to allow him to mature the mechanical parts of his invention.

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BAYLEY, J.—It is not only the duty of an inventor to state what he knew at the time of the patent, but the public have a right to be put in possession of all that he knows at the time of the specification.

LITLEDALE, J.—It must be some very strict technical rule to defeat this patent, and I see no reason for extending the doctrine already laid down. There has been no deception practised, and the public ought to have the advantage of the improvements, up to the time of the specification.

PARKE, J.—Concurred.

Rule refused.



MEMORANDUM. On the 22d of January, 1829, the whole of the Middlesex causes in the Lord Chief Justice's paper, as well special as common Juries, were entirely disposed of, and the paper completely cleared: which had not happened for many years before.

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COURT OF COMMON PLEAS.

Sitting at Westminster, after Trinity Term,
1828.

BEFORE LORD CHIEF JUSTICE BEST.

June 26th.

BROAD v. PITT.

No communications made to an attorney are privileged, but such as are made for the purpose of the attorney's either commencing or defending a suit.

REPLEVIN. In the course of the cause, a witness was called, who had been attorney for the defendant. He was asked as to some conversation which took place between the defendant and him, when the former executed a deed which the latter had prepared for him as his professional adviser.

Wilde, Serjt., contended, that the conversation was confidential, and could not be received in evidence. He cited *Cromack v. Heathcote* (a).

Russell, Serjt., *contra*, referred to *Williams v. Muddie* (b).

Wilde, Serjt.—If we apply the doctrine in *Williams v.*

(a) 2 B. & Bing. 4; reported also, 4 J. B. Moore, 357. That case is said to have decided that communications made by a party to an attorney are confidential, although they do not relate to a cause existing, or in progress, at the time they were made; and therefore, that, where an attorney was applied to by a father to prepare a deed, by which his property was to be assigned to his sons, and stated that there was no consideration for the assignment, on which

the attorney refused to prepare it, and it was afterwards drawn by another; the attorney was precluded from giving evidence of that fact in an action brought by the son, in which the validity of the deed was attempted to be disputed, although he was not employed in the cause.

(b) R. & M. 34. That case decides that the privilege of not being examined as to facts communicated to an attorney while employed in his professional capacity, extends only

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Mundie to the present case, we shall see at once the inexpediency of the rule which is there laid down. The party goes to advise with an attorney, and the attorney may recommend an action, or whatever else he thinks right: and how is the communication of the whole of the circumstances to be made safely, if it is not privileged?

BEST, C. J.—I am disposed to agree with my Lord *Tenterden*, in excepting only communications made for the purpose of bringing or defending actions. I think this confidence in the case of attornies is a great anomaly in the law. The privilege does not apply to clergymen, since the decision the other day, in the case of *Gilham* (a). I, for one, will never compel a clergyman to disclose communications, made to him by a prisoner; but if he chooses to disclose them, I shall receive them in evidence. There is also no privilege of this description in the case of a medical man (b). A man is not acting as an attorney, when he is consulted about a deed; and I cannot distinguish his situation from that of any other man. I can make a distinction where a person requires information for the purpose of defending himself or of commencing an action. I am of opinion that the evidence ought to be received.

It was mentioned to his Lordship, that the case of *Williams v. Mundie*, was acted upon in Ireland, at the trial at bar of *Rex v. O'Connell* and Others.

Wilde, Serjt., and *Platt*, for the plaintiff.

Russell, Serjt., and *R. V. Richards*, for the defendant.

to those communications which relate to the purposes either of bringing or defending an action or suit, existing at the time of the communication, or then about to be commenced. This case is also

reported in 1 Carr. & P. 158.

(a) Carr. Suppl. 61.

(b) See the Duchess of *Kington's* case, 11 Harg. Stat. Tr. 243; and *Rex v. Gibbons*, 1 Carr. & P. 97.

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Sitting in London, after Trinity Term, 1828.

BEFORE LORD CHIEF JUSTICE BEST.

June 27th.

BEVAN v. WATERS.

A livery stable keeper has a lien for the keep and exercise of a horse sent to him for the purpose of being trained.

ASSUMPSIT for money paid, &c. From the evidence, it appeared, that two horses, named Polecat and Blister, the latter belonging solely to the defendant, the former to the plaintiff and defendant jointly, were put into the hands of a person named Boast, who was a stable keeper, *for the purpose of being trained*. While they were there, the defendant sold to the plaintiff the horse Blister, and his half share of Polecat; but when the plaintiff applied to Boast to deliver them to him, in pursuance of the bargain, he refused to let Blister go, because the defendant had not paid him his charges for training. Notice was given to the defendant, by the plaintiff's agent, that he could not get the horse on account of Boast's claim. The defendant disputed the correctness of the account in some respects, and, whilst the dispute was going on, the plaintiff paid the charges, in order to obtain the horse, and sought to recover the amount, by this action, from the defendant; 40*l.* was remaining due of the purchase money, at the time at which the horse was to be delivered; but Boast's claim, at that time, amounted to 82*l.* and was afterwards increased, so that the plaintiff was obliged to pay a sum of 130*l.*, before Boast would deliver the horse to him.

Wilde, Serjt., for the plaintiff.—Whatever sum the defendant owed Boast, the plaintiff is entitled now to recover of him, having been obliged to pay it, to obtain the horse, which was standing at a great expense. I submit this, on the principle of several cases. If a man buys goods of another, which, at the time of sale, are in the

hands of a third person, having a claim upon them, the buyer has just as much a right to pay the demand to obtain them, as a tenant, in the case of a distress for ground rent, is justified in paying to release his goods, and either setting off the payment against his own rent, or recovering it in an action, as so much paid for his landlord. In such a case as the present, the law implies an *assumpsit*. In the case of *Gray v. Hill* (a), it was held, that the plaintiff having repaired premises, held by the defendant under a covenant to repair, on a parol promise by the defendant that he would assign him his lease, might, after a refusal to assign, recover, on an implied *assumpsit*, the expense of the repairs. The correctness of that decision was not doubted, but was acquiesced in, and the amount was referred. The plaintiff in the present case was obliged to pay the money by a species of duress upon his goods. The learned Serjeant also cited the case of *Brown v. Hodgson* (b).

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Jones, Serjt., for the defendant.—In point of law, a trainer has not a lien upon horses. The only case of a lien on horses is that of an inn-keeper, but that is a particular case, and rests upon the ground of the obligation of an innkeeper to take them in. The law imposes a particular duty upon him, and therefore it gives him a particular remedy. The question is, was there a just right on the part of Boast to detain? In the case of a distress, the debt is not only due, but the mode of proceeding is also legal; at all events, the payment in a case like the present must be made promptly, and the party cannot lie by for several months, and, while the matter is in dispute, dis-

(a) R. & M. 420.

(b) 4 Taunt. 189. That case decides, that if a carrier, by mistake, delivers to B. goods consigned and sold to C., and B. appropriates the goods, and the carrier, on demand,

without action, pays C. their value, the carrier may recover it against B. as money paid to B.'s use; but not as the price of goods sold and delivered to B.

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charge the lien behind the back of the seller. The plaintiff here cannot recover his demand as money paid for the defendant. He must either sue specially for the non-performance of the contract, or require the defendant to pay back the money which he had received for the purchase.

Wilde, Serjt., in reply.—This is not the case of a horse standing at livery, but of a horse put at a trainer's stables. There is nothing inconsistent in the trainer's having a lien. The reason why there is no lien in the case of a livery stable keeper is, that the horse in such case is kept for the purpose of being daily used by the owner.

BEST, C. J.—In the case of a livery stable keeper there is no lien, because the horse is subject to the control of the owner, and may be taken out by him; and the first time it goes away, there is of course an end of the lien. But I think, as at present advised, that a man who has a horse *for training*, has a lien for the keep and exercise of it. If Boast had not a just claim against the defendant, I think the plaintiff could not maintain this action. I am of opinion, that if a man buys property which is in the hands of a third person, who sets up an unfounded claim, and will not deliver unless that claim is paid, the purchaser is bound to give notice to the seller, and cannot, after several months, go and pay the demand; because he may, by his delay, deprive the seller of his evidence of the incorrectness of the claim. If the plaintiff in this case had paid without giving notice, I should have decided that he could not recover. It was determined in the reign of Queen Anne (*a*), that a livery stable keeper had not a lien upon a horse for its keep, and I decided upon that principle in a case in this Court lately (*b*). But in the present case there is a difference, for *the trainer* has not only to

(*a*) *Yorke v. Grenough*, 2 Lord Raym. 866.

(*b*) *Wallace v. Woodgate*, 1 Carr. & P. 575.

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keep the horse, but also to prepare it for racing; and therefore I think he has a lien upon it. For I take it to be a common law principle, that if a man has an article delivered to him, on the improvement of which he has to bestow trouble and expense, he has a right to detain it until his demand is paid. On the facts in this case, it appears that the plaintiff was bound to pay 40*l.*, as the balance of the purchase money, which he has not paid, and if the lien did not exceed that sum, then undoubtedly he could not maintain this action. But it appears that Boast's demand was 150*l.*; and though there were sundry payments, yet he had a right to apply them to the demand for Polecat, as he had parted with Polecat, and had no lien upon him. It appears that there was a balance of 82*l.* for which Blister might be detained. In point of law, and in point of justice also, the defendant ought to have cleared away that claim; and, not having done so, he is liable to the plaintiff for such proportion as was due in the month of September, at which time the horse should have been delivered. And as the horse was not delivered then, I think the plaintiff is entitled to some part of the demand for the subsequent time; but not the whole of it; because, if the horse had been delivered at the proper time, he would have been obliged to bear the expense of keeping it.

Verdict for the plaintiff.

Wilde, Serjt., and *R. V. Richards*, for the plaintiff.

Jones, Serjt., for the defendant.

[Attornies—*Bourdillon*, and *Norris & Co.*]

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*Adjourned Sittings at Westminster, after Trinity
Term, 1828.*

BEFORE LORD CHIEF JUSTICE BEST.

June 28th.

EDWARDS *v.* FAREBROTHER and Others.

Whether a woman who has cohabited with a man for several years, and passed herself off as his wife, can recover in trespass for the taking, under an execution against the man, of her goods, being in the house in which the cohabitation took place—*Quære.* But in such a case, it may be left to the Jury to say, whether they think, that, under the circumstances, the property was given up by the woman to the man, and if they do, they may find a verdict against her.

TRESPASS against the Sheriff of Middlesex and several other persons, one of them being a judgment creditor of a person named Salmon. The plaintiff was a Mrs. Edwards, who lived with Salmon as his wife, and the action was brought for the breaking and entering of the house in which they lived, and the seizure of the goods that were in it. It appeared that Salmon and the plaintiff had cohabited together for several years, and that the plaintiff had, during that time, answered to the name of Mrs. Salmon, when addressed by persons who called at the house; and it also appeared, that when a child of theirs was christened, it was entered in the register as "Emma, daughter of Thomas and Sarah Mary Salmon," (Sarah Mary being the christian names of the plaintiff). The house was rented in the name of Salmon till a short time before the execution, when it was altered to the name of Edwards, by the landlord's agent, in consequence of a false representation made to him by Salmon, that the landlord had consented to the alteration. Proof was given of the possession of two vans of goods by the plaintiff, and of the purchase for her by a broker, about ten years previous to the action, of others to the value of 22*l.*; but the evidence was very imperfect as to how many of them were in the house at the time of the seizure. The plaintiff also complained of the loss of lodgers in consequence of the trespass.

Wilde, Serjt., for the defendants.—A woman who has

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lived with a man, and passed herself off as his wife, cannot recover in trespass for the taking of her goods, which were in the house in which they cohabited, because she, by her conduct, has induced the public to suppose that they were the goods of the man with whom she lived, and has given him a credit in consequence with the world. The case of *Mace v. Cadell* (a), is an authority on this subject; and although it was a case of bankruptcy, yet the decision was not confined to that, but proceeded also upon the broad ground of cohabitation. It was an action of trover, brought by a woman to recover goods which had been taken by the assignees of a man named Penrice. The plaintiff, who kept a public house, represented herself at the excise office as married to Penrice, but afterwards denied the marriage, and asserted that the goods were her own sole property. The Court said, "that after a solemn declaration by the plaintiff that she was married to Penrice, and that these were the goods of Penrice in her right, she shall never be allowed to say that she was not married to him, and that the goods were her sole property." But, in this trading country, it does not require cases to support such a doctrine as that for which I contend.

Taddy, Serjt., for the plaintiff.—The facts relied on by the defendants are wholly irrelevant. The question is, whose property were the goods, and who was the tenant of the house at the time of the seizure? I admit that, in many cases, if a man live with a woman as his wife, and she obtain credit in consequence, and the tradesman sue him, it is no defence for him to say, that they were living in a state of concubinage. But it is very different as against the sheriff. He comes and seizes the goods as belonging to a particular person, and he must shew that he has taken the goods of the person against whom the

(a) 1 Cowp. 232.

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execution is. And this he must do at his peril. I allow that the risk is considerable, but the profits of the office more than counterbalance it. The ground of the rule in bankruptcy is, that a false credit is given, but the rule is confined to cases of bankruptcy; and it was because the inconvenience was felt so strongly in bankruptcy, that the statute of James was passed. If the law had been as contended for by the other side, then the statute of James would have been unnecessary. The question for the Jury will be, whether Mrs. Edwards, the plaintiff, was the lawful wife of Salmon; for, if so, the goods were his and not hers, but not otherwise. The mode in which the entry is made in the register, only shews that she did not wish to injure her own character. The property was not Salmon's, and she is entitled to recover, though she may have held out that she was Mrs. Salmon in every possible way. There may be a remedy against Salmon; but if the goods are the property of the plaintiff, there is no defence to the present action. As to the injury to trade, which has been alluded to, the tradesman has the security of the woman, if she is not married.

BEST, C. J.—The plaintiff complains of a trespass in the house, and the loss of lodgers in consequence; but it is for you to say whether there is any doubt that the house did not belong to her. With respect to the goods, there is proof that she had two vans full; and also that some were purchased for her about ten years ago, by a broker, to the amount of 22*l.*; and it is proved that some of these were in the house, but it does not appear to what extent in value. A case has been cited from Cowper's Reports, which, it has been said, is confined to cases of bankruptcy. But I do not think that it applies to cases of bankruptcy only. I think the latter part of the decision applies to a case like the present. For the Court there said, "In the consideration of this general question another point appeared, upon which we are equally clear,

namely, that after a solemn declaration by the plaintiff, that she was married to Penrice, and that these were the goods of Penrice, in her right, she shall never be allowed to say that she was not married to him, and that the goods were her sole property." I think that this is a good moral rule, and I consider that no law is good, which has not for its basis the immutable rules of good morals. Under this impression, I should have nonsuited the plaintiff, taking your opinion on the fact of her holding herself out as married; but I find, from the case of *Edwards v. Bridges*, reported in 2 Starkie, 396 (a), that a different opinion was entertained by Lord Tenterden, then Mr. Justice Abbott; and out of respect to that noble and learned Judge, I shall desire you, though I do not at present agree with the doctrine which he has laid down, to give your verdict for the plaintiff, unless you find against her upon other grounds. If you think the property contained in the house was Mrs. Edwards's, and was not given up to Salmon during the continuance of the connection between them, you will in that case find your verdict for the plaintiff; but if you think that it was not hers at the time of the seizure, but had been given up to Salmon, under the circumstances of the connection, then I see no reason why you should not find your verdict generally for the defendants. If you find for the plaintiff, I will thank you to tell me, whether you think the house was hers or Salmon's, and what portion of the property you consider to have belonged to her.

The Jury found for the defendants.

(a) That was an action by the same plaintiff against the Sheriff of Middlesex, in 1818, and the opinion there expressed was, "that in point of law, the circumstance of the plaintiff's having lived with

Salmon, as his wife, and having answered to his name, did not render" the goods "liable to an execution against him, and therefore that the only question was, as to the value," &c.

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Taddy, Serjt., and *Platt*, for the plaintiff.

Wilde, Serjt., *Milner*, and *W. Wilde*, for the defendants.

[Attornies—*Clutton & Co.*, and *Rodgers*.]

IN the ensuing *Michaelmas* Term, *Taddy*, Serjt., moved for a new trial; but the Court, without giving any opinion on the effect of the cohabitation, considered the verdict sustainable on the other ground, and therefore they

Refused a rule.

July 14th.

HANDAYSYDE and Others v. WILSON and Others.

If a vessel at sea is going close hauled to the wind, and another meeting her is going free, the rule of the sea is, for the latter vessel to go to leeward; and although such vessel may either go to leeward or windward as she best can, yet she ought, as a general rule, to suppose that the vessel going to windward will keep her position.

THE *first* count of the declaration stated, that the plaintiffs were possessed of a certain ship or vessel called the *Juno*, &c. which said ship or vessel, at the time of committing the grievance &c., was navigating and sailing on the high seas, near to the coast of *Whitby*, in the county of *York*; and that the defendants were the owners of a certain other ship or vessel, which, a little before, and at the time, &c., was also navigating and sailing on the high seas aforesaid, near to the said ship or vessel of the said plaintiffs, and was then and there under the care, direction, and management of the said defendants, and certain servants of theirs; yet the said defendants, not regarding &c., then and there by themselves and their said servants, so incautiously, negligently, unskilfully, and improperly managed, conducted, navigated, steered, and directed their said ship or vessel, that it, through the mere default, negligence, &c., of the said defendants, and their said servants, did then and there, with great force and violence, *run foul of, and struck upon and against* the said ship or vessel of and belonging to the said plaintiffs, and then and there broke, strained, &c. the same, by means

whereof the said ship or vessel, &c. then and there sunk in deep water, &c., and was thereby damaged, destroyed, and wholly lost, &c.

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The *second* count stated that the ship of the defendants was under the management, &c., of certain *servants* of theirs, on their behalf, and that such persons, not regarding their duty, &c. &c. Plea—Not Guilty.

From the evidence, it appeared, that about 5 o'clock in the morning of a day in September, the weather being very cloudy, the plaintiffs' vessel the *Juno* was on the Yorkshire coast, when she was met by the defendants' vessel the *Alert*. The *Juno* was coming to windward, and the injury seemed to have happened in consequence of the crew of the *Juno* supposing that the *Alert* would go to windward, going themselves to leeward instead of keeping to windward. The plaintiffs' witnesses said that they called to the crew of the *Alert*, to go to windward, and that they ought to have done so, as it was the rule of the sea for the ship which was light to give way to that which was laden. They all, except one, said, on cross-examination, that they did not know of any general rule which required that a vessel having the wind should go to leeward, when meeting one that was beating up against it.

On the part of the defendants, among other witnesses, Dr. Gwynne, a lieutenant in the navy, astronomical examiner to the East India Company, and a teacher of the art of navigation, stated the rule on his examination in chief, as follows:—"If a vessel is going close hauled to the wind, and another meeting her is going free, the rule at sea is, for the vessel meeting her to go to leeward; and the reason of it is, that otherwise the vessel going to windward would lose her position, and could not get in again, without another tack, and it would be an inconvenience to her, and not to the vessel going free."

On his cross-examination the witness said, that the vessel having the wind *may* either go to leeward or windward, as she best can; but that she ought to suppose, as

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a general rule, that the vessel going to windward would keep her position.

Jones, Serjt., for the plaintiffs.—I apprehend the rule to be this, that the ship which has the wind is so to use it as to avoid the other, and is to take that which, under the circumstances, is the most prudent and the safest course. There is no law, either of the sea, or the road, by which a person is justified in adhering to a particular course when it will be productive of mischief.

BEST, C. J., in summing up, said—The material question in this case is, not which of the vessels first struck the other, but whose negligence it was by which the injury was caused. If it was the result of accident, owing to the darkness of the night, the plaintiffs must look to their underwriters, and cannot recover in this action. So, also, if both parties were in the wrong, the plaintiffs must fail in this action. I agree with one observation made by my brother *Jones*, that although there may be a rule of the sea, yet a man who has the management of one ship is not to be allowed to follow that rule to the injury of the vessel of another, when he could avoid the injury by pursuing a different course. But if the matter comes into any doubt, as, for instance, in the case of a dark night, then we ought to look to the practice, as that which is to regulate the parties. The plaintiff examined as to the practice of that part of the coast on which the accident happened, and several of his witnesses swore, that the practice was, for the ship which was light to give way to that which was heavy. They said they had not heard of such a practice as that which has been proved by the defendants. But it seems to me difficult to conceive how, in a dark night, they can tell a light ship from a heavy one. The plaintiff says he called to them to go to windward, and they ought to have done so; but the defendants' witnesses say, that the ship coming to leeward must keep to lee-

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ward; and supposing two vessels to meet each other direct end to end, according to the rule which they speak to, it is for the vessel which is going with the wind to bear away, and not the vessel which is close hauled to the wind. As it appears to me this cause will depend upon these two points—if you think the defendants' ship was to leeward, I think you will find that they did right in keeping to leeward—if you find that the vessels were end and end, then you will ask, if there is such a practice as that spoken of by the witnesses for the defendants. It seems to me, on the first point, that the balance of evidence is, that the defendants' ship was going to leeward. The custom proved is, that the ship which has the wind at large may go either to leeward or to windward, but that, as a general rule, she ought to expect that the ship which is close hauled will keep to windward, and therefore she ought to go to leeward, unless it is quite clear that she can go to windward with safety. I agree with my brother *Jones* that it is not material to the issue to consider which ship struck the other, but I think, in point of fact, it is clear that the injury must have resulted from the *Juno* striking the *Alert*; but it is material when we are considering the rule of the sea. It is said, that if the vessel close hauled to windward went any farther to windward she would miss stays; but she is not required to go any farther, she is only required to keep her course. It seems it was dark when the injury happened; and if so, it was the more necessary that the rule of the sea should be adhered to. The question is, whether the *Alert* could see what tack the *Juno* was going on, and whether in the dark she ought not to conclude that the *Juno* would act according to the practice of the sea. I agree with my brother *Jones*, that if the captain of the *Alert* saw the *Juno* going one way, it was his duty to go the other; but the question is, whether, in this dark night, he had the opportunity of seeing. If he had not the opportunity of seeing, then he could trust only to the practice of the sea. I think it must be taken

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from the evidence, that neither of the crews heard the other's hailing.

His Lordship then left the questions to the Jury, requesting them to say what, in their opinion, was the rule of the sea under the circumstances of the case.

The Jury gave a verdict for the defendants, and found the rule to be, that the ship which is going to windward is to keep to windward, and the ship that has the wind free is to bear away.

Jones and Stephen, Serjts., and Parke, for the plaintiffs.

Wilde, Serjt., Brodrick, and Nichols, for the defendants.

[Attornies—*Allan, and Niron.*]

July 15th.

HOOD and Others, Assignees of CHARLES GREEN, a Bankrupt, v. REEVE and Another.

A clerk in a merchant's counting house may be called as a witness to explain the meaning of a particular entry in the books of the office made by a fellow clerk, since deceased.

If a person, on being applied to on a particular subject, writes in answer, mentioning another person,

and saying on one occasion, "He is in possession of my sentiments," and on another, "I have written to him, and I refer you to him thereon:" such letters are sufficient to constitute the party referred to agent in the business; and what he said at a meeting on the subject may be given in evidence against the principal.

ASSUMPSIT, for work and labour by the bankrupt, in effecting insurances, and for premiums of insurance paid by him. The defendant Reeve pleaded the general issue and the statute of limitations, and the other defendant (who was the father of the bankrupt) suffered judgment by default.

In the course of the plaintiffs' proof some of the books of the defendants were put in, and a witness, who was a clerk in their office, was asked to explain the meaning of a particular entry made by a fellow clerk, who had since died.

Taddy, Serjt., objected, that it was for the Jury to say what was the meaning of the entry from the books themselves.

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BEST, C. J.—I think that the question may be put. No doubt the gentlemen of the Jury will well understand the entry; but, as I am not a merchant, I think I am entitled to the explanation of the witness, and I think that he is competent to give it. Looking at the entry itself, it does not appear to be intelligible; and I consider that where there is an ambiguity on the face of an account produced, a person, who was a clerk in the office in which the account was kept, and who is conversant with the mode in which the business was conducted, may be permitted to explain the meaning of a particular item.

It appeared that an arbitration had been entered into respecting the bankrupt's account, and two letters were put in, signed by the defendant Reeve, and addressed to the bankrupt, in which he mentioned a person named Hancock, and in one of them said: "He is in possession of my sentiments, and will attend;" and in the other, "I have now to inform you that I have written to my friend Mr. Hancock on the same subject, and I refer you to him thereon."

A witness was asked whether, on the investigation of the account before the arbitrator, (which account was *the subject* referred to in the letters), Hancock had said: "I must confess I cannot shake this."

Taddy, Serjt., for the defendant, objected.—They must call Hancock, to shew under what circumstances he said it.

BEST, C. J.—I think this gentleman has made Mr. Hancock his agent for the purpose of explaining.

Spankie, Serjt.—The words are, "He is *in possession*

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of my sentiments," and that does not give him any authority to speculate and deliver an opinion of his own.

BEST, C. J.—I think that is too narrow a construction; I consider that any thing he says about the account is admissible in evidence. The defendant by these two letters says in effect: "Go to Hancock and he will tell you." It is for you afterwards to call Hancock to explain.

Wilde and Adams, Serjts., and *Perring*, for the plaintiffs.

Taddy and Spankie, Serjts., and *R. V. Richards*, for the defendants.

Attornies—*Freeman & Co.* for the plaintiffs, and *Oliverston & D.* and *Sheppard & Co.* for the respective defendants.]

July 17th.

RICE v. HAYLETT.

Semble, that a regulation in the seamen's articles of a merchant ship, that "every seaman committed to custody for the preservation of good order, shall forfeit his wages, together with every thing belonging to him on board the ship," is in point of law a good and proper regulation.

DETINUE for a chest of tools and some wearing apparel. From the evidence for the plaintiff, it appeared that he was a carpenter on board the *Georgiana*, an East India ship, of which the defendant was the captain, and that, on a voyage from Calcutta to England, the plaintiff was ordered into confinement by the defendant for insubordination, and the tools were taken out of his chest, and distributed to such men as could use them. When the ship arrived in the docks, the plaintiff demanded his tool chest and some wearing apparel, which he had on board, but they were both refused him by the defendant's orders.

Wilde, Serjt., for the defendant, opened, that he should prove that the ship's articles contained a stipulation, that every seaman committed to custody for the preservation of good order should forfeit his wages, together with every thing belonging to him on board the ship; and he con-

tended, that, under this stipulation, as the plaintiff had been confined for misconduct, the defendant was justified in detaining the articles in question.

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BEST, C. J.—Is this one of the regulations authorized by the statute 2 Geo. 2, c. 36?

WILDE, Serjt.—No, my Lord, it is not. That statute only provides for the forfeiture of wages, and not the forfeiture of the things on board; but it requires that the seamen shall obey all commands; and the commands in the present case have this penalty of forfeiture attached to the breach of them.

The subscribing witness to the execution of the articles was called, but did not appear.

BEST, C. J., (in summing up), said—As these articles are not proved, you must find your verdict for the plaintiff. If they had been produced, probably your verdict would have been the other way. I think the regulation alluded to is a very proper regulation in articles of this description; for the commerce of the country cannot be properly carried on, if insubordination on board a ship is not prevented, by the adoption of strong measures.

Verdict for the plaintiff.

JONES, Serjt., and PLATT, for the plaintiff.

WILDE, Serjt., for the defendant.

[Attornies—F. M. Wegener, and Davis & Co.]

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Oct. 31st.

PROCTOR v. BRAIN.

Whether, in an action against a broker by his principal for charging an increased price in addition to his commission, it is competent to the broker to shew that in some of the transactions he acted as a principal, it being contrary to the duty and oath of a broker so to act—*Quære*.

To prove the averment of actual payment by the principal of the overcharges, it is sufficient to shew a running unsettled account between the parties, by which it appears, that, as far as the particular transactions in question are concerned, the principal has paid more than the amount of the overcharges, though, on the whole account, continuing to a period long subsequent, the balance is in favor of the broker to more than their amount also.

THE *first* count of the declaration stated, that in consideration that the plaintiff, at the request of the defendant, would retain and employ him as a broker, to purchase for him divers large quantities of wine and spirits for certain reasonable commissions and reward, he (the defendant) undertook to charge the plaintiff *the cost price* of all such wines and spirits as he should from time to time purchase for him, and that the plaintiff did employ the defendant; but although the defendant did purchase on account of the plaintiff divers large quantities of wine and spirits, to wit, &c.; and although the cost price of the said wines and spirits amounted to a certain large sum of money, to wit, &c.; yet the defendant, not regarding, &c.; but contriving, &c., did not nor would charge the *cost price*, but on the contrary charged a much greater price, &c.; which greater price, it alleged, the plaintiff had actually paid. The *second* count stated the defendant's undertaking to be, that he would charge the plaintiff for such wines as he purchased on his account, *as cheap a price as he himself from time to time should pay for them*. Money counts. Plea—General issue.

On the part of the plaintiff, the bond given by the defendant for the due performance of his office was proved. It contained the substance of the regulations made with respect to brokers by the Court of Aldermen, in pursuance of the statute 6 Ann. c. 16. They are, among others, "That no broker shall make out or take any bill of parcels in his own name, or receive or take any bill of parcels or invoice on account of his principal, made out in his the broker's name, nor shall demand, receive, or take any larger sum of money than the amount of the usual brokerage or commission." "That every broker shall and do enter every bargain or contract he shall make in a book, to be kept in his office or counting house, and to be entitled

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'The Broker's Book,' on the day of making every such bargain or contract, with the christian and surname at full length of both the buyer and the seller, the quantity and quality of the articles sold or bought, and the price of the same, and the terms of credit agreed upon, and deliver a contract note to both buyer and seller, or either of them, upon being requested so to do, within twenty-four hours after such request respectively, containing therein a true copy of such entry."

It appeared also that the defendant took the oath administered to brokers on their admission, which is, that they will truly and indifferently execute their office without fraud or favour between party and party, according to the best of their skill and ability.

The complaint against the defendant was for having charged a larger price than he paid for the articles, in addition to his broker's commission. The items of overcharge were in the year 1825, and the month of January, 1826.

There was a running account between the plaintiff and defendant, extending to the year 1827. The balance at the end of the year 1825 was against the plaintiff, to the amount of 785*l.*; but in the course of the year 1826 he paid in sums amounting to 2000*l.*, but the balance on the whole account appeared, after those payments, to be still against him.

Taddy, Serjt., for the defendant, contended, that the plaintiff must be nonsuited. He avers in his declaration, that he employed the defendant to buy for commission, and that the defendant promised to supply him at the cost price, but charged a greater price than the cost price, and that he had paid the defendant the overcharges. Now there is no evidence of any such payment.

Wilde, Serjt., for the plaintiff, put in a book containing a running account: and from the entries it appeared, that, at

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the close of the year 1825, there was a balance against the plaintiff of 785*l.*, but in the course of the year 1826 payments were made by the plaintiff to the amount of 2000*l.*, (a sum considerably exceeding the amount of the overcharges); but, in December, 1826, the balance was still against the plaintiff to the extent of 300*l.*

Taddy, Serjt., and *C. Cresswell*, for the defendant, contended, that this did not support the allegation, inasmuch as the defendant not having claimed of the plaintiff the balance which was due upon the whole account, the plaintiff could not be said to have overpaid on the previous items. He might deduct the amount from the balance if the defendant claimed it of him, and he therefore could not be said to have paid it.

Wilde, Serjt.—The question is, whether the balance of 785*l.*, owing by the plaintiff in December, 1825, has not been extinguished for every legal purpose. There were payments in 1826 to the amount of 2000*l.*, and the rule of law is, that the payments extinguish the items which are earliest in point of date. The defendant cannot contend that the old balance has not been paid.

BEST, C. J.—I shall not nonsuit the plaintiff upon this objection.

Taddy, Serjt., then further objected, that the allegation was not proved, that the defendant promised to charge only the cost price, as it was clear that he was to charge commission in addition. Nor was the second count proved, which spoke of as cheap a price as the goods could be obtained for. The averment ought to have been, that he was to charge the cheapest price over and above the commission.

BEST, C. J., still declined to nonsuit, and—

Taddy, Serjt., then addressed the Jury, and called a witness named Binyon, for the purpose of proving that the dealings between the plaintiff and defendant were sales between principals, and not purchases on commission.

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Wilde, Serjt., objected to the evidence.—The defendant enters into an obligation not to act as a principal. He delivers contracts signed as a broker, and holds himself out to the public as a broker, and he is precluded from setting up as a defence that he was not acting as a broker, but as a principal. He cannot be heard in a Court of justice to dispute the documents which he has executed, and the public character which he has assumed. They are conclusive against him. The bond is given for public objects, and it is contrary to public policy to allow him to give the evidence proposed.

Bompas, Serjt., on the same side.—The question is, whether a man, in defending an action, shall be allowed to shew that he has been guilty of perjury; and that, taking the oath into consideration, will be the case if this evidence is allowed to be given.

Platt.—It is clear that a broker who acts as a principal acts illegally, and he cannot be permitted to take advantage of his own wrong.

Taddy, Serjt., in reply.—This is not a question with any person having a right to sue upon the instruments alluded to; but the question here is, whether the plaintiff has not so misconducted himself that he cannot take advantage of the misconduct of the defendant.

BEST, C. J.—If this had been an action by your client for goods sold, I should have nonsuited him long ago: But there is the difficulty of the plaintiff's being a party to the illegal transactions. I think the best way, as the

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point is new, will be to receive the evidence, and let the cause go to its end. Whichever way it is ultimately decided, this cause is one of the most important that have been tried at Guildhall. I hope it will lead to some arrangement, that will put an end to the mode by which the merchants and traders of this city are plundered by persons who profess to act as brokers, and in whom they place their confidence as such. I hope that the Court of Aldermen, who possess the power, will think it their duty to enforce their regulations.

Taddy, Serjt., said, that, after his Lordship's observations, he would rather withdraw the proposed evidence.

Wilde, Serjt., replied.

BEST, C. J. (in summing up), said—A man who is a sworn broker cannot be a principal, and this is so for the wisest reasons. I was much surprised to find the defendant's partner come forward to make the avowal, that the defendant, who had sworn not to act as a principal, had been acting as such for a period of two or three years. I am satisfied that no body of men will rejoice more in seeing the regulations enforced than the brokers themselves. If I employ a broker I pay him for his assistance, and I suppose that I have the benefit of his judgment. I suppose that he is acting honestly; but what security have I if a man is to shift his character at pleasure from that of principal to broker, and from that of broker to principal. With respect to the objection, as to the allegation of payment, it appears that, at the end of the year 1825, 700*l.* was due by the plaintiff, but he afterwards, in the course of dealing, paid to the amount of 2000*l.* I am of opinion that this may be applied in liquidation of the particular items relied on by the plaintiff. If the defendant thinks that this will work any injustice, he may apply to the Court of Chancery, or to the Court of Common Pleas, to stay exe-

cution until it is ascertained what the real balance is. For, if no proceedings could be had till the final settlement of the account, the plaintiff would be in a dreadful situation, and the defendant would escape punishment.

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Verdict for the plaintiff—119*l*.

The defendant had leave to move the Court on the objection as to the effect of the running account with regard to the allegation of payment.

Wilde and *Bompas*, Serjts., and *Platt*, for the plaintiff.

Taddy, Serjt., and *C. Cresswell*, for the defendant.

[Attornies—*Dicas*, and *Mitchell*.]

In the ensuing Michaelmas Term, *Taddy*, Serjt., moved, pursuant to the leave given.

BEST, C. J.—A broker engages that he will buy as cheap as he can, and charge no more than his commission. If he fails in either of these a cause of action arises immediately. That was the way in which it was put to the Jury, and they have found a verdict, which I think there is no pretence for disturbing, either at law or in equity.

PARK, J.—My brother *Taddy's* motion proceeds on the ground, that this is a fair account between the parties; whereas, in point of fact, it is no such thing.

Rule refused.

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First Sitting at Westminster, in Michaelmas Term, 1828.

BEFORE LORD CHIEF JUSTICE BEST.

Nov. 7th.

WRIGHT v. MELVILLE.

Where a carriage is hired for a certain time, and sent back before the expiration of it, if the party of whom it was hired sell it within the time he cannot recover his charge for the hire.

ASSUMPSIT. The plaintiff was a coachmaker; and it appeared that the defendant went to the plaintiff's premises to hire a low phaeton for five weeks; he selected one, and said he would give five guineas a-week. It was sent to him, and after keeping it two or three days he sent it back. He afterwards called and said it was too heavy for his poney, and he would take another, but he did not take any other, and refused to pay for the five weeks' hire.

It was suggested, on the part of the defendant, that the plaintiff had sold the phaeton within the five weeks, but this was denied by the plaintiff's witnesses.

BEST, C. J., told the Jury, that if the carriage had been sold within the five weeks that would have been a rescinding of the contract, and the plaintiff would not have been entitled to the sum claimed; but as that did not appear to be the case, he was entitled to a verdict for the five guineas a-week.

Verdict accordingly.

Andrews, Serjt., and —, for the plaintiff.

V. Lawes, Serjt., for the defendant.

[Attornies—*Young & Co.*, and *R. Thomas*.]

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*Second Sitting in London, in Michaelmas Term,
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BEFORE LORD CHIEF JUSTICE BEST.

TAYLOR v. LAWSON.

Nov. 14th.

LIBEL. Pleas—Not guilty, and three justifications.

Semble, that it would be a good practice, in the administration of justice, to keep all the witnesses out of Court at Nisi Prius, except the person under examination.

On the first witness being called for the defendant—

Andrews, Serjt., for the plaintiff, made application to his Lordship to give directions for the rest of the witnesses to go out of Court.

BEST, C. J.—I confess that for one I wish the same rule prevailed here as prevails in the Houses of Lords and Commons, where no witnesses are allowed to be present except the person who is under examination. I will grant the application.

Verdict for the defendant, on one of the special pleas.—Jury discharged from giving a verdict on the others.

Andrews, Serjt., and *Busby*, for the plaintiff.

Wilde, Serjt., and *Platt*, for the defendant.

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Adjourned Sittings at Westminster, after Michaelmas Term, 1828.

Dec. 6th.

WIGGINS and Another v. BODDINGTON, Esq.

A Dock Company having a swing bridge on a public highway are bound, in the passing of vessels, to use all reasonable means (both as to the number of men employed and the number of ships passed at a time) to prevent unnecessary delay; and if they do not do all which can be expected of reasonable men, and any one is obstructed in consequence, such obstruction will make them liable in damages for the injury sustained.

THE *first* count of the declaration stated in substance, that the plaintiffs, by their servants, were driving carts, laden with sand, along a certain public highway called Wapping High Street, leading to St. Catherine's Docks, and that the London Dock Company, on the 1st of November, 1827, and on other days between that time and the 31st of March, 1828, obstructed and straitened the street, by keeping open a certain swing bridge during unreasonable spaces of time.

There was another count for general obstruction of the way, and it was alleged that the plaintiffs (to enable them to perform a contract into which they had entered) had been obliged, on account of the obstruction, to take another wharf, and provide more carts than they would otherwise have required. Plea—Not Guilty.

The plaintiffs were wharfingers and carmen, who had contracted to carry bricks and sand from their wharf to St. Catherine's Docks, and in their way there had to pass over a swing bridge at the London Docks, called the Navigation Bridge; and the complaint in the cause was, that their carts, which were in number ten, and went backwards and forwards twelve times a-day, were so delayed in their passage by the keeping open, for unreasonable spaces of time, of the swing bridge, for the letting in and out of ships, that they were obliged, after a time, to provide two additional carts, and also to obtain another wharf in a different situation.

For the plaintiffs, several of their carmen were called, who spoke to being detained sometimes a quarter of an

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hour, sometimes twenty minutes, and on one occasion half an hour, and they stated that they had seen two ships go in and one come out without the bridge being closed. They also said that there was another bridge, called the Hermitage Bridge, on the same line, but that it was not used for the passage of ships. One witness mentioned an instance in which, after the bridge had been open for twenty-five minutes, only light carts were allowed to go over, and as he was proceeding with a loaded cart to make the attempt, the bridge was forced against the horse and hurt it. This witness also said, that the dock-men used to go with the ships down to the river before they attended to the shutting of the bridge, in consequence of which the carmen were often obliged to shut it themselves. On their cross-examination, these witnesses were not able to give dates, or to speak either to the state of the weather or the tide at the periods to which they alluded.

The dock-master of St. Catherine's Dock stated, that the London Dock Company had generally but one set of men to attend to the vessels passing and the bridge, though, on an emergency, they employed an additional number. He however said, that, during the time he had observed, there was no unnecessary delay, and that much depended upon the state of the weather. He considered five minutes as the average time in good weather for passing a vessel.

The bridge-master of the West India Docks stated, that they, at their dock, employed two sets of men, fourteen to attend to the vessels and eight to attend to the bridge, and that twenty minutes was the longest time ever occupied in passing a vessel. He admitted that they had ships of greater burthen than the London Docks, but said that they employed all their men, whatever the size of the vessel; and added, that it was not their practice to pass more than one vessel without closing the bridge. No complaint was made to the London Dock Company, of which the defendant was the treasurer, till the month of February, 1828.

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Bosanquet, Serjt., for the defendant. The company was established for the express purpose of improving the navigation of the port of London, and, among other things taken into consideration, was the state of the ways, and, among other ways, this of Wapping High Street. The Legislature thought, notwithstanding the inconvenience to the proprietors of wharfs, that there would be an obstruction. The bridge is stated on the record to have been erected in pursuance of the acts of Parliament. There is no doubt that this company are bound to discharge their duty with a due regard to the traffick of the public, but their primary object is, to see that ships are not delayed. They are not to turn back any vessels presenting themselves to go in or out. There are only certain times at which vessels can be docked, and every advantage is to be taken of those times, to let in as many ships as possible. Much also depends upon the state of the tide. If a vessel is delayed, and bilged in consequence, an action will lie against the Dock Company, and the same if it falls back and injures another. The delay of a cart for half an hour cannot be compared with the demurrage of a ship for a tide. The docks have been open ever since 1805. These plaintiffs were only there for a temporary purpose, and the business of the company has been conducted in the usual way; and the complaint is, that they have not altered their mode, and increased their number of men, on account of this temporary purpose. There is no proof of any obstruction in March, about which time the notice was given. The plaintiffs ought to have been prepared with evidence to shew what the state of the weather was, for their own witness has proved that all depends upon it. They have not specified the times, so as to enable us to meet their evidence. It appears, that on the occasion most particularly relied on, the light carts were allowed to go over, as they could pass quickly, and the heavy ones were only prevented, because they would have occasioned delay, which, as a ship was coming, would have been very serious.

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On the part of the defendant, the dock-master of the London Docks was called, (having been released after objection on the part of the plaintiff), and stated, that their number of men was ten, and that they only passed more than one vessel at a time, when, from the state of the tide, they would not otherwise be able to get them out in time. In answer to questions from his Lordship, the witness said, that they had no men whose particular duty it was to attend to the swinging of the bridge, and admitted, that if they had the public might get over more quickly. The surveyor of the pavements at Wapping was also called, and said, that in his opinion the bridge was managed with due diligence, and that it might make about three minutes difference if there were an additional number of men. A tradesman, who lived near the bridge, said, that he thought it was not kept open unnecessarily. He had complained of the stoppage as an inconvenience, but he did not consider it to have arisen from any want of diligence.

Russell, Serjt., in reply.—It is said, on the part of the defendant, that it is a question between the ships and the carts, as to which are to be duly attended to; but I contend, that the Dock Company may act rightly as to both. There was an express clause in the 39 & 40 Geo. 3, c. 47, which required that they should make two bridges. [*Bosanquet*, Serjt.—That clause has been since repealed]. The company contrived to get it repealed afterwards, and they must have done that by persuading the Legislature that they would so use the one bridge as not to inconvenience the public. But there is the Hermitage entrance which they might have used, and which would have benefited the public. I contend, that the ships are not to be the primary object of the company's attention. The land traffic has much increased lately. My proposition is, that there has been *unnecessary* delay, and that part of my case has not been answered; because there are not in the winter any men to attend peculiarly to the bridge. It is

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said that the time is short during which vessels can come in and out; but that is a reason why a double set of men should be kept, and the most thus made of the time. The liability of the company to an action for demurrage is another reason. It seems, that since March (when our notice was given) they have not passed three ships at a time as they did before, and this shews that they have found that other docks manage better, and have discovered that which is the legal course for them. At the West India Docks they never pass two ships without shutting the bridge, if carts are waiting. They attend to the interests of both parties, and why should not the London Dock Company do the same? The dock-master, in his evidence, admitted that there are many instances in which the men go as far as the river before they close the bridge. Is this the way in which the public are to be treated, with many carriages waiting? He admits, that if they had more men, people might pass sooner. This is the whole of the case:—this is what I rely on. They ought to have another set of men for the bridge; and in not having them there has been culpable negligence; and for this the plaintiffs are entitled to recover.

BEST, C. J. (to the Jury).—In order to support this action the plaintiffs must shew that the bridge was kept open longer than was necessary for the purpose for which it was made. If they have done that, they are entitled to a verdict. I should have liked the plaintiffs' case better, if complaint had been made earlier to the Dock Company. I should have liked it better also if the plaintiffs had fixed, by evidence, on some specific day, that the state of the weather might have been considered. The vagueness of the plaintiffs' evidence has prevented the defendant from meeting the case as he otherwise might. The plaintiffs have proved that their business has been very much injured. The defendant's witnesses also admit that they have been interrupted, but they add, that they do not consider

the delay as unnecessary. The fact of delay is clear beyond all dispute; but the plaintiffs must make out that the delay was unnecessary. I agree with the observation of the defendant's counsel, that the Dock Company is extremely beneficial to the public; if not, the Legislature would not have suffered the interruption of the public highway. I cannot better put you in possession of the principle on which you are to act, than by referring you to the acts of Parliament, which originally provided that there should be two bridges, so that when one was shut the other might be open. It appears that afterwards this was considered not to be an advantage to the public, and therefore the provision was repealed; but under what circumstances does not appear. What arguments were addressed to the Legislature to induce them to repeal it, we do not know; they might have been that both could not be used well, and that the one should be so managed as not to inconvenience the public. The question is, whether the defendants have done all that they ought to do. It seems that as long as the dock-master of St. Catherine's had an opportunity of observing, there was no unnecessary delay. If five minutes is the time for carrying a ship through, then it is the duty of the London Dock Company to provide a sufficient number of men to do it in that time. The witness from the West India Docks says that the delay of twenty minutes occurs about once a-week. It is said, that the West India Dock ships are generally larger than those of the London; but it seems that they have there twenty-two men in attendance, both for large and small. If that is necessary for the West India Dock Company, then it is for you to say whether it is not necessary for the London Dock Company also. One of the witnesses says, that an increase in the number of men would make about three minutes difference. This appears to be a very small space of time, but it is for you to say whether, if occurring to several ships, it might not be a convenience to the public. The dock-master himself says, that if he had more

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men there would be a saving of time. It is for you to decide whether the delay which has occurred has been unnecessary. Several most respectable witnesses have said, that in their opinion there was no unnecessary delay; but on the other hand it has been proved that the plaintiffs have sustained much inconvenience. It is for the Company to avail themselves of all reasonable means to enable them to accomplish their duty and perform their contract with the public; and if they have not done so, and delay has been thereby occasioned to the plaintiffs, it is such a delay as will sustain the present action. If the Dock Company have done all that could be expected of reasonable men, availing themselves of such means as they ought, then the defendant will be entitled to your verdict; but if they have not, then you will find for the plaintiffs.

Verdict for the plaintiffs.—Damages, 5*l*.

Russell, Serjt., *Erle*, and *Holroyd*, for the plaintiffs.

Bosanquet, *Wilde*, and *Spankie*, Serjts., for the defendant.

[Attornies—*Woodward & S.*, and *Lowdham & Co.*]

In the course of the cause, the cases of *Rex v. Dewsnap*, 16 East, 196; and *Rex v. Kerrison*, 1 M. &

S. 435, and 3 M. & S. 526, were referred to.

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Adjourned Sittings at Guildhall, after Michaelmas Term, 1828.

MALLALIEU v. LAUGHER and Another.

Dec. 15th.

TROVER for two trunks, containing wearing apparel, &c. Plea—Not guilty. The plaintiff, who lived at Manchester, deposited the trunks in question at the warehouse of a Mr. Smith, in Cheapside. The defendant Laughher, who was a merchant in London, and agent to Messrs. Knight and Fossett, of Birmingham, instituted proceedings in the Sheriff's Court; in consequence of which, on the 31st of March, 1828, the other defendant, who was named Page, and was an officer of the Sheriff's Court, accompanied by other persons, went to the warehouse of Smith, and delivered to him a paper, containing a notice of attachment, at the suit of Laughher; and having done this, he laid his hand on the trunks, and said, "I attach these, as the property of Knight and Fossett." He afterwards put his seal upon them. On the 7th of April, Mallalieu's attorney gave a notice to the defendant Laughher, requiring him forthwith to withdraw the attachment, and pay the expenses which had been incurred, and threatening an action in the event of a refusal. On the 15th of April, the attorney, in the presence of Page, opened the trunks, when it appeared that they did not contain any Birmingham goods. He immediately went to the defendant Laughher, and told him what had been done, and whose the goods were. He said he was satisfied with the information, and should act as he was advised. The attachment was withdrawn on the 28th of April.

Semble, that the attaching by process from the Sheriff's Court in London, of property in the hands of the garnishee, is not such a conversion as will enable the owner to maintain trover.

Wilde, Serjt., for the defendant.—The plaintiff must be called. The attachment does not take the goods out of the hands of the garnishee; it does not alter the possession: and

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therefore it is no conversion. The garnishee is under no obligation to hold any goods but those of the debtor. He may plead that he has no goods of the debtor's in his hands. What the officer said, was only a declaration, that the particular articles are the goods of the debtor. It is no more than a notice. This is not an action on the case, for preventing the taking by the plaintiff; the garnishee might deliver at his discretion. There can be no conversion without the party has possession or control. The plaintiff did not demand the goods of Smith, and there is no evidence that he wanted them.

BEST, C. J.—I have great difficulty in saying that trover is maintainable here.

Taddy, Serjt., for the plaintiff.—It is quite sufficient cause of action in trover, that there has been a seizure in consequence of process from a Court of local jurisdiction, as the owner could not take the goods without subjecting himself to the powers of that Court. In the case of *M'Combie v. Davies* (a), there is a *dictum* of Lord *Ellenborough*, where he refers to a case of *Baldwin v. Cole* (b), in which it was held, that the taking an assignment of property is a conversion, although the assignment was not valid to pass the property. It is the meddling or interfering with the property which constitutes the conversion. This is not an attachment generally of any property of Knight and Fossett's which Smith might have, but of the specific articles. Any intermeddling is sufficient. Lord *Ellenborough* says, "certainly a man is guilty of a conversion, who takes my property by assignment from another, who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect." The act of seizure in its natural effect produces a detention, which is an inconvenience to the owner.

(a) 6 East, 538.

(b) 6 Mod. 212. Opinion of Lord *Holt*.

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BEST, C. J.—I am no great friend to the action of trover, nor to any action which keeps parties so much in the dark as those forms which are founded upon fiction. I cannot find any instance similar to the present, and I am unwilling to extend the operation of such actions. I think my Lord *Ellenborough* went to the extreme verge of the law in the case reported in 6 East. As far as that, I should go myself, and agree with the decision of my Lord *Holt*. In the case decided by my Lord *Ellenborough*, the state of the property was changed, because there was a transfer in the dock books, which, it is well known, is as much a transfer for the purposes of trade, as an actual removal from one warehouse to another. There was in that case the exercise of dominion over the goods. But, in the present case, the man does not remove the goods, he leaves them still where they were, in the possession of Smith; and I do not think that is enough to support an action of trover. I think it better, in all these cases, that we should not allow this nonsensical form of losing and finding to be extended any farther than it has at present gone. Where the law has been settled we ought not to unsettle it; but, where it has not, we should take care that this absurd jargon is not carried any farther, particularly when there are forms of action which give the party the advantage of knowing the nature of the case against him. I think it right that the plaintiff should be called; but I will give my brother *Taddy*, leave to move the Court to enter a verdict for nominal damages.

Nonsuit.

Taddy, Serjt., and *Steer*, for the plaintiff.

Wilde and *Andrews*, Serjts., for the defendants.

[Attornies—*Robinson*, and *Platt*.]

A RULE nisi was obtained in Hilary Term, 1829, which

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stood over till Easter Term; and an arrangement was then made between the parties : in consequence of which, no opinion was given by the Court upon the point.

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CHAPLIN v. HAWES and Others.

Though the rule of the road is not to be adhered to, if, by departing from it, an injury can be avoided, yet in cases where parties meet on the sudden, and an injury results, the party on the wrong side should be held answerable, unless it appear clearly that the party on the right had ample means and opportunity to prevent it.

ACTION for an injury done to a horse which the plaintiff's servant was riding, by a cart which the servant of the defendant was driving. It appeared that the cart was advancing towards a turnpike having two gates, one for carriages going one way, and one for carriages going the opposite way. A chariot was stopping at the proper gate through which the cart should have gone, and this induced the driver to turn off to the other gate, when at the distance of about six yards. The plaintiff's servant was riding through that gate when the injury happened. He was called as a witness, and, on his cross-examination, stated, that he was three or four yards from the gate, when he saw the cart coming towards it, and could have pulled up, but did not, because he thought the driver would wait for him, as it was not the gate through which the cart had a right to pass.

Wilde, Serjt., for the defendant.—If the plaintiff's man was pertinaciously insisting on his right of coming through the gate, when he might have avoided the injury, either by waiting or turning aside, the plaintiff cannot recover. His being on his right side will not justify him in persisting so as to produce the injury, when it might have been prevented by his pursuing a different line of conduct.

Spankie, Serjt., for the plaintiff.—It is desirable to adhere to the law of the road, in order not to mislead the opposite party; and, unless there is a clear mode of escape, the party who is on the proper side should not attempt

any departure from the ordinary course, as he will make such an attempt at his own peril.

BEST, C. J.—If the plaintiff's servant had such clear space that he might easily have got away, then I think he would have been so much to blame as to prevent the plaintiff's recovering. But, on the sudden, a man may not be sufficiently self-possessed to know in what way to decide; and in such a case I think the wrong-doer is the party who is to be answerable for the mischief, though it might have been prevented by the other party's acting differently.

Verdict for the plaintiff—31*l.* 10*s.*

Spankie, Serjt., and *Steer*, for the plaintiff.

Wilde and *Adams*, Serjts., for the defendants.

[Attornies—*Hunt*, and *King*.]

See the case of *Handasyde v. Wilson*, *ante*, p. 528.

KAY, Bart., and Others *v.* BROOKMAN and Others.

Dec. 17*th.*

ASSUMPSIT for money paid to the use of the defendants, as share-holders in a mining company. To shew that the defendants were members of the company, the deed by which it was constituted was put in. The subscribing witness to the execution of it by one of the defendants was not produced, but his brother was called, who stated, that he told him some time before, that he was going out of the country, and that he had not seen him since, and believed that he went away to avoid a charge of embezzlement made by a gas-company, to which he had been collector.

To dispense with the necessity of calling the subscribing witness to a deed, it is sufficient to shew that he expressed an intention of leaving the country, that he had reason for doing so to avoid a criminal charge, and that his relations have not seen him since he expressed his intention of going.

It is not necessary, in the absence of the subscribing witness, to prove the hand-writing of the party executing the deed, it is enough to prove the hand-writing of the witness.

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stood over till Easter Term; and an arrangement made between the parties: in consequence of this opinion was given by the Court upon

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Dec. 15th.

CHAPLIN v. H.

Though the rule of the road is not to be adhered to, if, by departing from it, an injury can be avoided, yet in cases where parties meet on the sudden, and an injury results, the party on the wrong side should be held answerable, unless it appear clearly that the party on the right had ample means and opportunity to prevent it.

ACTION for an injury to the plaintiff's servant was riding. The defendant was driving a carriage advancing towards the plaintiff's carriages going on the opposite way.

through which the plaintiff's servant fell. The defendant's driver was at a distance of about 100 yards from the plaintiff's carriages when the accident occurred.

The plaintiff's counsel called Serjt., for one of the defendants, objected that the defendant's hand-writing of the party executing the deed should be proved.

BEST, C. J., intimated, that he thought it was not necessary.

Campbell, for another defendant.—It is *vexata questio*. Mr. Justice *Bayley* holds, that the hand-writing of the party executing ought to be proved; and Lord *Tenterden* holds, that it need not. But Mr. Justice *Bayley's* practice appears to me to have the better reason in its favor, because, if the subscribing witness is not produced, it will stand as if there was no subscribing witness, and then the hand-writing of the party executing should be proved.

BEST, C. J.—I have a great respect for the opinion of my brother *Bayley*, but I think I am bound in such a case to act as my predecessors have done. It has been the

to prove the hand-writing of the at-
of opinion that it is the most
der that mode as most desir-
the number of witnesses (a).

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at for the plaintiffs.

for the plain-

at;

er, Serjt., and Comyn, for

., for three others; and

, Serjt., for another.

ornies—Stevens & Co., for the plaintiffs; and Kirkman, Golding,
Saunders & Co., Healing, Knight, for the respective defendants.]

(a) It may perhaps be asked how, if the subscribing witness be not called, is the *identity* of the party executing to be proved, unless by calling somebody who knows his hand-writing? But to this it may be replied, that it is not to be presumed that the sub-

scribing witness would have attest-
ed the execution of any other per-
son than the person described in
the deed; and this will be an an-
swer to the argument relied on,
that, in the absence of the sub-
scribing witness, it will stand as it
would if there were none.

BARKER v. BARKER and Another.

Jan. 20th.

TRESPASS for entering the plaintiff's apartments and
injuring his goods. Pleas—Not guilty, and leave and
license.

A landlord has
no right to en-
ter his tenant's
premises to re-
pair them, with-
out some stipu-
lation to that
effect.

One of the defendants was the plaintiff's landlord, and
the other a tradesman employed by him. The defence
was, that they entered to repair. There was no stipula-
tion at the time of the letting for such entry.

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BEST, C. J., told the Jury that a landlord had no right to enter to repair without some stipulation to that effect; and as there was no such stipulation in the present case, however absurd it might be in the tenant to object, unless he had assented to the landlord's coming in to do the repairs, he would be entitled to some damages. But if they should think that he had assented, then the defendants' plea was proved, and they would be entitled to a verdict.

Verdict for the plaintiff.—Damages, 20l.

Wilde and *Bompas*, Serjts., and *Coleridge*, for the plaintiff.

Cross and *E. Lawes*, Serjts., for the defendants.

[Attornies—*Gibbins*, and *Turner*.]

Jan. 21st.

PEDLEY v. WELLESLEY, Esq.

The wife of the defendant in a suit cannot be examined as a witness for the plaintiff without the defendant's consent, although it appear that he married her after she was actually subpoenaed to give her evidence in the cause.

ASSUMPSIT for work and labour and divers journeys and attendances. Plea—General issue.

The defendant had appealed to the House of Lords against a decree of Lord Chancellor Eldon, on the subject of the custody of his children, and the plaintiff was employed to go abroad for the purpose of obtaining witnesses to be examined in the matter. To establish his case (among other witnesses), the plaintiff's counsel called Mrs. Helen Bligh; she appeared; but her father, being asked, stated, that she was married to the defendant in November, 1827. This, it appeared, was after she had been subpoenaed to give evidence in the cause.

Wilde, Serjt., for the defendant, objected to her being examined.

Cross, Serjt., for the plaintiff, submitted, that a party

to a suit could not, by marrying his adversary's witness, deprive him of the benefit of the evidence of such witness, and more particularly where (as in the present case) the action had been commenced, and the party actually subpoenaed, before the marriage took place.

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Brodrick, on the same side.—The point has not been decided in the case of a married woman, but the principle has been established in the case of an underwriter; and that principle is, that a party to a suit cannot by any act of his deprive his adversary of the testimony of his witness, whether that act be laudable or otherwise.

BEST, C. J.—I cannot see any analogy between the cases of a married woman and an under-writer. I will allow the witness to be examined if the defendant consents, but not without. Lord Mansfield once permitted a plaintiff to be examined with his own consent. Some of the Judges doubted the propriety of that permission, but I think that it was right.

Wilde, Serjt., for the defendant, refused to consent; and the witness was not examined.

Nonsuit.

Cross, Serjt., and *Brodrick*, for the plaintiff.

Wilde, Serjt., and *Platt*, for the defendant.

[Attornies—*R. Hill*, and *Whitelock*.]

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MEMORANDUM.

IN Hilary Term, 1829, *Edward Goulburn, Esq.*, was called to the degree of Serjeant-at-law.

COURT OF KING'S BENCH.

Second Sitzings at Westminster, in Hilary Term,
1829.

BEFORE LORD TENTERDEN, C. J.

Feb. 4th.

BAILEY v. HOLE.

If, at a trial, it be discovered that a witness for the defence is one of the bail, and therefore incompetent, the Judge at the trial will, on the defendant's depositing a sufficient sum with the associate, make an order for striking the witness's name out of the bail-piece, so as to render him a competent witness.

The amount to be deposited must be the sum sworn to, and a further sum for costs.

MONEY lent. Plea—General issue. The defence was, that the sums of money which had passed from the plaintiff to the defendant were payments and not loans. This was proved by a witness, who, on his cross-examination, admitted that he was one of the defendant's bail.

LORD TENTERDEN, C. J.—I must strike out his evidence.

Campbell, for the defendant, offered to deposit a sum of money; and stated, that, in a case in the Court of Common Pleas, Lord Chief Justice *Best* had said that he would make an order to strike out the name of a bail from the bail piece, so as to make him a competent witness, if a sum of money were deposited by the defendant in the hands of the associate.

LORD TENTERDEN, C. J.—If you will deposit a sufficient sum of money, I will immediately make an order for striking this witness's name out of the bail-piece.

Brougham, for the plaintiff.—What sum must they deposit?

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Lord TENTERDEN, C. J.—The sum sworn to, and a further sum for costs.

The sum sworn to was 40*l.*, and *Campbell* offered to deposit that and 50*l.* more for costs. These sums were paid into the hands of Mr. Bellamy (the associate), and his Lordship signed an order for striking the witness's name out of the bail piece.

The cross-examination of the witness was proceeded in, and the Jury, on his evidence, found a—

Verdict for the defendant.

Brougham, and *Platt*, for the plaintiff.

Campbell, and *Godson*, for the defendant.

[Attornies—*Bright*, and *Woodward*.]

Adjourned Sittings in London, after Hilary Term, 1829.

BEFORE LORD TENTERDEN, C. J.

PLATTS, Administratrix of MANTLE, v. LEAN, Executor
of SUTHERLAND.

Feb. 26th.

MONEY had and received by the defendant, as executor, to the use of the plaintiff, as administratrix.

This action was brought to recover a sum of 100*l.* From the evidence of a witness for the plaintiff the following facts

A. was indebted to B. in a sum of 868*l.*, for which he was arrested. C., who was clerk to B.'s attorney, directed him to

be discharged on paying 700*l.* only. B. threatened to complain to C.'s employers, to prevent which C. advanced 100*l.*, B. agreeing that it should be repaid whenever the balance of 168*l.* should be recovered from A. After the death of B. and C. the balance was recovered:—*Held*, that the representatives of C. might recover the 100*l.* from the representatives of B., on a count for money had and received to their use, and that there was no necessity to declare specially.

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appeared:—In the year 1806 the intestate, Mr. Mantle, was the principal clerk of Messrs. Shawe and Le Blanc, who were attorneys for the defendant's testator, Mr. Sutherland. At that time General Gillespie was indebted to Mr. Sutherland in the sum of 868*l*. Messrs. Shawe and Le Blanc were employed to cause the General to be arrested for this debt, and General Gillespie was accordingly arrested, but was discharged out of custody by the direction of Mr. Mantle, on payment of 700*l*. only. A few days after this Mr. Judd, who was the agent of Mr. Sutherland, and had the management of almost all his affairs, called on Mr. Mantle at the office of Messrs. Shawe and Le Blanc, and threatened to complain to his employers of his having directed General Gillespie's discharge, on his paying no more than 700*l*. of the debt. To prevent this complaint Mr. Mantle paid to Mr. Judd the sum of 100*l*. out of his own pocket, it being agreed between them that this sum was to be repaid to Mr. Mantle whenever the remaining sum of 168*l*., due from General Gillespie to Mr. Sutherland, should be recovered from the General.

In the year 1811, General Gillespie was killed at the siege of Kalumji, in the East Indies; and, after his decease, the representatives of Mr. Sutherland made a claim on the General's representatives for the balance then due, with interest, which balance included the sum of 168*l*. above mentioned.

It was proved by Mr. Hadden, one of the defendant's attorneys, that the whole of the balance, and the interest thereon, due from General Gillespie's estate to Mr. Sutherland's estate, was paid to him as attorney for the defendant in the month of July, 1828.

F. Pollock, for the defendant.—I submit that the plaintiff cannot recover in this action. This is a special contract to pay 100*l*. to Mr. Mantle on a certain event, and that can only be recovered on a declaration stating that special contract, and not on a count for money had and received.

Lord TENTERDEN, C. J.—I am clearly of opinion that the plaintiff may recover on this declaration, framed as it is. When this balance of 168*l.* was received from the estate of General Gillespie, one hundred pounds of it belonged to Mr. Mantle's representative, and it then became money had and received by the defendant to the use of the plaintiff as administratrix. The plaintiff is entitled to a verdict for 100*l.*

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Verdict for the plaintiff.—Damages, 100*l.*

Denman, and *Carrington*, for the plaintiff.

F. Pollock, for the defendant.

[Attornies—*Ewington & Chilcote*, and *Gattie, Hadden, & G.*]

ANSELL v. ANSELL.

March 7th.

ASSUMPSIT. Pleas—The general issue, and the statute of limitations. The only evidence given to take the case out of the statute was a parol acknowledgment.

Gurney, for the defendant, submitted, that since the act of the 9th Geo. 4, c. 14 (*a*), such an acknowledgment was not sufficient.

Sir *J. Scarlett*, for the plaintiff, stated, that the action was commenced before the 1st of January, 1829, when that act came into operation; and contended that, therefore, its provisions did not apply.

It has frequently been held at *Nisi Prius*, that the 1st sect. of the 9th Geo. 4, c. 14, applies to parol acknowledgments made before its provisions came into operation:—and *semble*, that from its wording such construction is the right one.

Lord TENTERDEN, C. J., was of opinion, that the words

(*a*) Intituled, "An act for rendering a writtten memorandum necessary to the validity of certain promises and engagements." See *ante*, pp. 298 *et seq.* where its provisions are set out at length.

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of the new statute had relation to the time of the trial, and therefore that the parol promise was not sufficient evidence to take the case out of the operation of the statute of limitations (b).

A Juror was afterwards withdrawn.

Sir J. Scarlett, and D. Pollock, for the plaintiff.

Gurney, and Chitty, for the defendant.

(b) The question whether the 1st section of the 9 Geo. 4, c. 14, has a retrospective operation, and applies to parol acknowledgments made before its provisions came into effect, has been frequently considered. Mr. Justice Bayley, and Mr. Baron Hullock, on the Northern Circuit, and Mr. Justice Gaselee on the Western, have all decided at Nisi Prius in accordance with the opinion expressed by Lord Tenterden. Lord Chief Justice Best, also, on being applied to at Nisi Prius, to take out of its turn a case in which the statute of limitations had been pleaded, assented to the application, in order that it might be tried before the 1st of January. In the Court of Common Pleas, in Bank, a rule nisi for changing the venue from London to Leicester was discharged, on the ground, that, if it were granted, the case, which was one to which the statute ap-

plied, would be delayed till the Assizes, which would be held after the new act came into operation. And thus the matter stood, till Easter Term, 1829, when Mr. Serjt. Merewether, in a case of *Fowler v. Chatterton*, argued against the construction previously put upon the act, and contended, that it ought not to be considered as having a retrospective operation, as well on account of its wording as the manifest injustice which such a construction would work. The Court of Common Pleas seemed to be of opinion that the previous decisions were correct, but took time to consider and consult with the Judges of the King's Bench on the subject; but finding, on inquiry, that a case was pending in that Court upon the point, they directed the matter to stand over till that case should have been argued.

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Adjourned Sittings at Westminster, after Hilary Term, 1829.

BEFORE LORD TENTERDEN, C. J.

DOE, on the Demise of HOGG, *v.* TINDALE and LAMBERT.

EJECTMENT for certain copyhold premises situate in the parish of St. Anne, Limehouse. The defendant Tindale defended as landlord, the other defendant Lambert being his tenant, who claimed no title except such as he derived from his landlord. The two defendants appeared by separate attornies, and had separate counsel.

Campbell, having addressed the Jury for the defendant Tindale—

F. Pollock, wished to address the Jury on the behalf of the other defendant, Lambert.

LORD TENTERDEN, C. J.—*Mr. Pollock*, I do not think I ought to hear you. If your client had any separate title to set up, of course I must hear you upon that; but, as you and *Mr. Campbell* both appear to support exactly the same title, I think I can hear only one of you.

F. Pollock.—I submit that I ought to be heard, because there may be observations that I may make for the tenant, which may not have been made by the counsel for the landlord; and, if I am not allowed to address the Jury, my client is not at all benefited by my appearing here.

LORD TENTERDEN, C. J.—Yes he is, you have had the opportunity of cross-examining all the witnesses who have been called for the lessor of the plaintiff; and if you

April 23rd.

If in an ejectment a landlord and tenant defend by different attornies and have different counsel, but it appear that the tenant claims no title but what he derives from the landlord the Judge at the trial will only allow one counsel to address the Jury for the defence, but the party's counsel who does not address the Jury will be at liberty to cross-examine, and also to call witnesses.

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have any evidence to lay before the Jury, you will be at liberty to do so; but I cannot hear two counsel address the Jury in support of exactly the same title. No one is more willing to hear counsel than I am, but still, for the sake of precedent, I think I cannot hear you; more especially as I happen to know, that, on account of the office that I hold, the other Judges very much adopt the same course of practice that is observed on trials before me.

F. Pollock did not address the Jury.

Verdict for the plaintiff.

Sir J. Scarlett, and *Platt*, for the lessor of the plaintiff.

Campbell, and *Hutchinson*, for the defendant *Tindale*.

F. Pollock, and *Chitty*, for the defendant *Lambert*.

[Attornies—*J. Tebbutt*, and *Holmes & G.*]

April 25th.

HEUDEBOURCK v. LANGTON and LANGLEY.

In an action on the stat. 13 Geo. 3, c. 78, s. 48, against surveyors of highways, to recover double the amount of a sum not paid over by them to their successors, a notice of action

was given, stating that an action would be brought against them, for that they had in their hands a balance of 353*l.* 19*s.* 4*d.* At the trial, it appeared that only 60*l.* 8*s.* 3*d.* was in their hands:—Held, that this notice was not sufficient, and that the plaintiff could not recover the double amount.

Whether a succeeding surveyor of the highways can recover a balance in the hands of the two surveyors who preceded him, in an action for money had and received to his use—*Quære*: but held, that if, in that form of action against both, it be shewn that the money came to the hands of one only, the plaintiff must be nonsuited, although it be also shewn that the defendants were jointly surveyors.

If several parishioners in vestry sign a resolution in the Vestry minute-book, stating that they approve of an action brought by the surveyor of the highways against A., and that they do thereby guarantee to him all legal expenses that are or may be incurred by him in prosecuting that suit; this binds them personally, and will render each person signing it incompetent to be a witness on the trial of that action.

an act passed in the 13th year of his late Majesty King George the Third, intituled, [here it set forth the title of the general highway act, 13 Geo. 3, c. 78,] whereby an action had accrued to the said plaintiff," &c (a). There was a count for money had and received, and a count upon an account stated. Plea—General issue.

This was an action of debt, against the defendants, as late surveyors of the highways of the hamlet of Mile End, Old Town, for not paying over a sum of money to the plaintiffs, who were their successors in office, that sum having been disallowed by the Justices in passing their accounts. By this action it was sought to recover double the sum retained (b).

(a) By sect. 75 of the same stat. it is enacted, "that every prosecutor or informer may, at his election, sue for and recover any forfeiture or penalty imposed by this act, which shall amount to the sum of forty shillings or upwards, (the manner of recovery thereof not being particularly directed by this act), either in the manner hereinbefore directed, or by action at law, to be brought by such informer or prosecutor, in any of his Majesty's courts of record, in manner following: that is to say, where any person shall be liable to any such pecuniary penalty, it shall and may be lawful to sue for and recover the same by action of debt, in which it shall be sufficient to declare that the defendant is indebted to the plaintiff in the sum of —, being forfeited by an act passed in the thirteenth year of the reign of his present Majesty, intituled, *An act to explain, amend, and reduce into one Act of Parliament*

the statutes now in being for the amendment and preservation of the public highways within that part of Great Britain called England, and for other purposes: and the plaintiff, if he recovers in any such action, shall have double costs."

And by sect. 76, it is provided, "that there shall not be more than one recovery for the same offence, and that ten days' notice in writing be given to the party offending, previous to the commencement of such action: and that the same be brought and commenced within one calendar month after the offence for which such action is brought shall have been committed."

(b) By the general highway act, 13 Geo. 3, c. 78, s. 48, it is enacted, "that the surveyor of the highways for every parish, township, or place, shall keep one or more books, in which he shall enter a just, true, and fair account of all such money as shall have come to his hands." The stat. then goes

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It was proved, that the defendants were appointed surveyors of the highways of the hamlet of Mile End, Old Town, for the year ending October, 1828; and it was also proved, that, ten days before the commencement of this action, the defendants were served with the following notice of action:—

Sirs,—I, William Heudebourck, surveyor of the highways in and for the hamlet of Mile End, Old Town, in the county of Middlesex, do hereby, according to the statute in such case made and provided, give you and each of you notice that I shall, at or soon after the expiration of ten days from the time of your being served with this notice, cause a precept, called a bill of Middlesex, to be sued out of his Majesty's Court of King's Bench, at Westminster, against you, at my suit, and proceed thereupon according to law. For that you being surveyor or surveyors of the above-named highways, in and for the year ending on the 3rd day of October, 1828, were, upon the examining and passing of your account before his Majesty's justices of the peace in and for the said county, in petty Sessions, on the 3rd day of October instant, found and declared to be indebted in the sum of 353*l.* 19*s.* 4*d.*, for monies had and received by you as such surveyor or surveyors, to the use of the said hamlet, in consequence of the charges, disbursements, and expenditure, to the amount

on to provide, that he shall produce his account at the Vestry, and that, after that, he shall take his account to a justice of the peace, who may either allow it, or postpone it until a special Sessions; "and in case any articles contained in such accounts shall not be explained and proved to the satisfaction of such justices, they may disallow the same." The stat. then proceeds to direct the surveyor to deliver over all

sums of money which shall remain in his hands, to the succeeding surveyor; and it is enacted, that "in case he shall make default in the payment, or accounting for the money so remaining in his hands, within the time and according to the directions" of this act, "he shall forfeit double the value of the money which shall be adjudged by the said justices to be in his hands."

of 60*l.* 3*s.* 3*d.*, alleged and stated in your said account to have been paid and made by you, being disallowed by the said justices; and also for that you were then and there adjudged by the said justices to have in your hands, of the proper monies of the said hamlet, the said sum of 353*l.* 19*s.* 4*d.*; and, you and each of you having wholly made default in the paying and accounting for the said last-mentioned sum of money so found to be in your hands as aforesaid, either to me, being such surveyor as first aforesaid, or to any other person or persons lawfully authorized to receive the same for or on account of the said hamlet, although, on the 17th day of October instant, I duly demanded and required you to pay the said sum of 353*l.* 19*s.* 4*d.* to me; and thereby, by force of such default, forfeited and became liable to pay double the value of the said last-mentioned sum of money, which was so found by the said justices to be in your hands as aforesaid; and the said action will be so commenced and prosecuted for double the value of the said money so received by you as aforesaid. And I further give you notice, that, in case you do not pay the said monies before the expiration of the time aforesaid, you will also be indicted for your misdemeanor according to law. Dated this 18th day of October, 1828. Your's &c.

Wm. Heudebourck.

“ To Robert Langton, and Thomas Langley, and each of them, late surveyors of the highways for the hamlet of Mile End, Old Town.”

It appeared that when the defendants went before the justices to have their accounts allowed, the justices disallowed an item of 60*l.* 3*s.* 3*d.*, which had been paid to collectors as poundage, for collecting the highway rate; and that no greater amount was disallowed by the justices.

The defendant's counsel objected, that this notice was

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insufficient; as a notice of action should, in a case of this kind, state specifically what sum the plaintiff claimed to recover. The declaration gave no information to the party, and it would be quite impossible for him to defend himself, if the notice of action was not precise in stating what sum it was that the plaintiff charged the surveyors with not having paid over. The notice of action was for a sum of 353*l.* 19*s.* 4*d.*, and the evidence, at most, only went to an item of 60*l.* 3*s.* 3*d.*

Lord TENTERDEN, C. J. (having conferred with *Bayley*, *Littledale*, and *Parke*, Js.)—I have consulted the other Judges, and they agree with me that the double sum cannot be recovered, as this notice is not such as is required by the act of Parliament. As to the count for money had and received, I need only say that the Judges think the case ought to go on.

Sir *J. Scarlett*.—There is a decision of the Court of Exchequer, in the case of *Underhill v. Ellicombe* (c), which goes to shew that the surveyors of highways cannot recover in an action of debt. Indeed, if the present plaintiff was to recover on this count, he would not be liable to account to the parish, because he recovered in his own right.

Lord TENTERDEN, C. J.—I do not think that case is analogous to the present. I think the case must proceed.

(c) M'Clel. & Y., 450. That case decided, that the surveyors of highways could not maintain an action of debt against the rector of the parish for the amount of composition money, duly assessed in lieu of statute-duty; and the Court there said that that was a claim given by statute, and that the same statute which created

it prescribed a particular remedy for its enforcement.

In the same case it is also laid down, that, "if a statute prohibits the doing of a thing under a penalty, without saying to whom it shall be paid, and does not prescribe any mode of recovering, an action of debt may be maintained by the party grieved."

On the part of the plaintiff, a witness named Cuthbert was called. He stated on the *voir dire* that he had signed a resolution of the vestry of Mile End, Old Town, to guarantee the plaintiff his legal expenses in this action; but he added, that he considered himself as signing this only as a parishioner in vestry, and not in his individual capacity. This resolution was read from the vestry minute-book, and it was in the following form:—

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“At a vestry meeting held,” &c., “It was moved by Mr. Hall, and seconded by Mr. Sadler senr., that this meeting do approve highly of the disallowance by the magistrates of the various charges in the surveyors’ accounts objected to by the inhabitants on the 2nd of October last, and also the proceedings taken by the present surveyor Mr. William Heudebourck, for the recovery of the money due to the hamlet from Messrs. Stayner & Langton, and Messrs. Langton & Langley; and do hereby guarantee to him all legal expenses that are or may be hereafter incurred by him in prosecuting the said suit.” Signed by Mr. Cuthbert and twenty-three other persons.

Lord TENTERDEN, C. J.—I think that this is a personal liability. This witness cannot be examined.

The witness was not examined.

Several witnesses were called, from whose evidence it appeared that all monies collected for highway-rates, &c. were paid over to the defendant Langton; but that none of the money ever came to the hands of the other defendant.

Lord TENTERDEN, C. J.—This evidence will not support an action against the two for money had and received by them jointly.

Brougham.—Both are surveyors, and though one be

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the most active, yet the money is, legally speaking, received by both.

Lord TENTERDEN, C. J.—To maintain an action for money had and received against two, you must give distinct evidence of something done by each touching the receipt of the money. If you mean to charge them as joint-surveyors, you must proceed under the act of Parliament.

Nonsuit.

Brougham, Denman, and Chitty, for the plaintiff.

Sir J. Scarlett, Campbell, J. L. Adolphus, and Kelly, for the defendants.

[Attornies—*D. Richardson, and Evitt, P. & L.*]

IN the ensuing Term, *Brougham* moved for a new trial, but the Court refused a rule.

April 28th.

REX v. BROWNE.

An indictment for perjury, tried before the Lord Chief Justice, at Westminster, charged the perjury to have been committed on a trial at *Nisi Prius*, at the King's Bench Sittings. The prosecutor, to prove the trial

INDICTMENT for perjury, on the trial at *Nisi Prius* of a cause of *Carpenter v. Jones*, which was tried before Lord Tenterden, C. J., at the Sittings at Westminster.

To prove the trial of the cause of *Carpenter v. Jones*, the *nisi prius* record was put in, but there was no *postea* indorsed upon it; and the only evidence of that cause having been actually tried was the minute of the verdict indorsed on the *nisi prius* record, in the hand-writing of *Nisi Prius*, put in the *nisi prius* record, with the minute of the verdict indorsed on it by the associate. There was no *postea* drawn up, and the associate stated that none could be drawn up, as a rule for a new trial was pending:—Held, to be sufficient proof of the trial at *Nisi Prius*.

the associate. It was, however, stated by the associate, that the *postea* could not be indorsed on it, as a motion for a new trial was pending.

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Denman, C. S., for the defendant, objected, that without the *postea* there was no sufficient evidence that there was a trial.

Sir *J. Scarlett*, *Campbell*, and *Platt*, *contra*, argued, that, under the circumstances of the present case, the minute of the associate indorsed on the *nisi prius* record was sufficient evidence of a trial.

LORD TENTERDEN, C. J., having retired and consulted with the other learned Judges, said, that in their opinion the evidence was sufficient.

The case proceeded, and the defendant was acquitted upon the facts.

Sir *J. Scarlett*, *Campbell*, and *Platt*, for the prosecution.

Denman, C. S., and *Patteson*, for the defendant.

[Attornies—*Fisher*, and *J. & H. Lowe*.]

In the case of *Rex v. Smith*, 8 B. & C. 341, and Carr. Suppl. 189, which was an indictment for a conspiracy to prevent a witness from attending to give evidence in a case of felony, the indictment alleged, "that, at the General Quarter Sessions of the peace, holden at Usk, in and for the county of Monmouth, on Monday the 10th day of July, 1826, before certain of his Majesty's justices of the peace assigned, &c. a certain bill of indictment against the said H. S. was duly preferred

and found." And to prove this allegation, an examined copy of the indictment (without any caption) was produced; and the deputy clerk of the peace produced the minute-book of the Quarter Sessions, to prove the holding of the Sessions: but this proof was held to be insufficient.

In the case of *Rex v. Horne Tooke*, for high treason, 25 St. Tr. 446, the minutes of the Court were received to prove the acquittal of Mr. Hardy. But in the case of *Rex v. Smith*, above cited, Lord

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Tenterden said, that the case of *Rex v. Tooke* was distinguishable; because there the matter proved by the minutes occurred before the same Court, sitting under the

same commission.

As to the minute-books of inferior Courts, see the cases of *Rex v. Hains*, Comb. 337; and *Fisher v. Lane*, 2 W. Bl. 834.

COURT OF COMMON PLEAS.

Sittings in London, after Hilary Term, 1829.

BEFORE LORD CHIEF JUSTICE BEST.

Feb. 14th.

BREEDON v. MURPHY.

The 136th section of the 57 Geo. 3, c. xxix. requiring twenty-one days notice of action, applies to the case of an action brought against a contractor for the removal of dust, &c. appointed by the Commissioners of Sewers for the city of London, for an alleged trespass, in seizing a cart supposed to contain dust, and assaulting and imprisoning the driver.

THE *first* count was for seizing, distraining, and impounding certain cattle, goods, and chattels of the plaintiff, and detaining them for five days. The *second* count was for beating a horse of the plaintiff. The *third* count was for seizing a horse, cart, and harness; and alleged that the defendant converted and disposed of them to his own use. The *fourth* count was for assaulting and imprisoning one James Fisher, a servant of the plaintiff. Plea—Not guilty (a).

The defendant was one of the scavengers appointed by the Commissioners of Sewers for the city of London. It appeared that, on the 1st of October, 1828, the plaintiff was employed to remove some rubbish by a bricklayer, who was repairing a drain within the district for which the defendant was scavenger (b). The defendant, con-

(a) The stat. 57 Geo. 3, c. xxix. under which the defendant contended that he was justified in making the seizure &c. complained of, allows the giving in evidence, under the general issue, of

the special matter relied on as a defence.

(b) He was appointed under the 59th section of the 57 Geo. 3, c. xxix. above mentioned.

sidering that the plaintiff's cart contained cinders and dust, insisted on taking it to the green-yard. He also sent the carman to the Compter, and the case was heard at the Mansion-house on the following day. The cart was detained at the green-yard for four days, and the plaintiff had to pay fourteen shillings to get it released. The plaintiff's witnesses swore to an assault upon Fisher, and also that the defendant beat the horse, and dragged him from side to side of the road (a).

Andrews, Serjt., for the defendant, submitted, that the plaintiff must be nonsuited, as he had not given twenty-one days' notice of action, pursuant to the 57 Geo. 3, c. xxix. s. 136 (b).

(a) By the 60th section of the above-mentioned act, it is enacted in substance, that, if any person other than the properly appointed scavengers, shall go about collecting dust, &c., any justice of the peace may, upon complaint, issue his warrant to bring the offender before him; and also, that any person seeing the offence committed may seize the offender, together with the cart, horses, &c., and, without any warrant, convey the offender before a justice, &c.

(b) That section is as follows: "And be it further enacted, that no action or suit shall be commenced against any person or persons for any thing done in execution or pursuance of any local act or acts of Parliament relating, either exclusively, or jointly with any other objects or purposes, to the pavement of any parochial or other district within the jurisdiction of this act, until after twenty-one days notice in writing, signed by the per-

son or persons intending to bring such action or suit, and specifying his or their real residence, and his or their trade or profession, shall be thereof given to the clerk or clerks to the said commissioners or trustees, or other persons having the control of the pavements in any parochial or other district within the jurisdiction of this act, wherein any fact may be committed, or for which such action or suit may be brought, nor after sufficient satisfaction shall be made or tendered, nor after three calendar months next after the fact may be committed, for which such action or suit shall be so brought; and all such actions or suits shall be laid and tried in the county of Middlesex, or city of London, and not in any other county, city, or place; and that the defendant or defendants in such action or actions, suit and suits, and every of them, may plead the general issue, and give any local act or acts of Par-

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Wilde, Serjt., and *Thesiger*, *contra*, contended, that the section referred to only applied to matters affecting the pavements, and also that it could not apply to a case like the present, because the notice was required to be given to the clerk of the trustees or commissioners, and not to any other person.

BEST, C. J., was of opinion that the notice was required, looking at the whole of the section, which not only mentioned any thing done in pursuance of local acts, but also any thing done in pursuance and by the authority of that act. His Lordship thought that the section was obscurely worded; but taking it altogether it appeared to him to be applicable to the case.

Wilde, Serjt.—The injury to the horse can hardly be considered as coming within the act.

BEST, C. J.—I think it is within the act, because the

liament relating to any such parochial or other district, or this act, and the special matter, in evidence, at any trial or trials which shall be had thereupon, and that the matter or thing for or on which such action or suit shall be brought, was done in pursuance and by the authority of any such local act or acts, or of this act. And if the said matter or thing shall appear to have been so done, or if it shall appear that such action or suit was brought before twenty-one days notice was given as before directed, or that sufficient satisfaction was made or tendered or paid into Court as aforesaid, or if any such action or suit shall not be commenced within the time before for that purpose limited, or shall be laid in any other coun-

ty, city, or place than as aforesaid, then the jury shall find for the defendant or defendants therein; and if a verdict shall be found for such defendant or defendants, or if the plaintiff or plaintiffs in such action or suit shall become nonsuited, or suffer a discontinuance of such action or suit, or if upon a demurrer or demurrers in such action or suit, or upon a verdict, or otherwise, judgment shall be given for the defendant or defendants therein, then, and in either of the cases aforesaid, such defendant or defendants shall have treble costs, and shall have such remedies for recovering the same as any defendant may have for the recovery of costs in other cases by law."

party might tender amends for any excess. I think that the act embraces the whole, and that the plaintiff must therefore be called.

Nonsuit (a).

Wilde, Serjt., and *Thesiger*, for the plaintiff.

Andrews, Serjt., *Comyn*, and *Payne*, for the defendant.

[Attornies—*Willoughby*, and *Loxley, Fry, & Thorn*.]

(a) The case was not moved. The following case has occurred lately on the same act of Parliament. Kingston Spring Assizes, 1829. *Burns v. Carter*.—Trespass against the clerk of the commissioners of pavements for the liberty of the Clink within the borough of Southwark. The defence was under a local act, relating to the paving, lighting, &c. of the clink only; which act requires that all actions for any thing done under it should be brought within six months. The present action was in point of fact commenced rather more than three months after the trespass complained of. And *Gurney*, for the defendant, objected that it was not in time, under the 136th section of the 57 Geo. 3, c. xxix. *Andrews*, Serjt., for the plaintiff, replied, that the 57 Geo. 3, did

not apply, as the act complained of was done under the local act, and could not have been justified under that act; and he referred to the 138th section of the 57th Geo. 3, which saves all clauses in local acts not specifically repealed. *Alexander*, C. B., was clearly of opinion, that the words in the 136th section of the 57 Geo. 3 were sufficient to comprehend the case, and therefore directed the plaintiff to be called.

Andrews, Serjt., and *Hutchinson*, for the plaintiff.

Gurney, and *Platt*, for the defendant.

In the ensuing Easter Term, *Andrews*, Serjt., moved the Court of Common Pleas to set aside the nonsuit; but they were clearly of opinion against him, and therefore refused a rule.

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*Adjourned Sittings at Westminster, after Hilary
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BEFORE LORD CHIEF JUSTICE BEST.

Feb. 16th.

FISH v. TRAVERS.

In trespass, where there are special pleas of justification, but no plea of the general issue, the defendant is entitled to begin, although the declaration alleges special damage.

TRESPASS for shooting a dog. The general issue was not pleaded, but there were special pleas justifying on the ground of the dog's being accustomed to bite mankind. The declaration alleged that the plaintiff was put to certain specific expenses by reason of the shooting of his dog.

Spankie, Serjt., submitted, that the defendant was entitled to begin, as the issues were upon him.

Wilde, Serjt., for the plaintiff, contended, that he was not, because there was an allegation in the declaration, that the plaintiff was put to certain expenses, which allegation, he submitted, entitled the plaintiff to begin.

Spankie, Serjt., replied, that that would make no difference, and referred to *Cooper v. Wakley* (a) and *Cotton v. James* (b).

Wilde, Serjt.—The allegation of special damage distinguishes those cases from the present. In those cases there was no special damage, the damage was merely consequential, and the plaintiff could have no evidence to give upon the subject.

BEST, C. J.—I cannot see any distinction between the

(a) *Ante*, p. 474.(b) *Ante*, p. 505.

two kinds of damage; and therefore I think that the defendant ought to begin.

Nonsuit.

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Wilde, Serjt., and *Thesiger*, for the plaintiff.

Spankie, and *Russell*, Serjts., for the defendant.

[Attornies—*Clift & F.*, and *Amory & Co.*]

SULLIVAN v. JONES and Another.

Feb. 21st.

ASSUMPSIT. The *first* count in the declaration was on an agreement, by which the defendants undertook to build for the plaintiff four houses, in Bedford-place, Kensington, for a sum of 2,000*l.*, to be paid by instalments—400*l.* when the foundations were laid and part of the walls built—400*l.* when the walls were built to the basement of the upper story—400*l.* when the houses were roofed and slated—and the remaining 800*l.* when they were completely finished, which they were to be by the 24th of June, 1828. The defendants also agreed to take the houses of the plaintiff for the term of three years certain from the said 24th of June, at the clear net yearly rent of 42*l.* for each house, to be paid quarterly. There was a stipulation that it should not invalidate the agreement in case the plaintiff should pay any of the instalments before or after the time specified and agreed on. The count averred a tender and offer by the plaintiff to the defendants to let them the houses on the terms specified, and their refusal to take them. The *second* and *third* counts were for use and occupation, and the rest, the usual money counts. Plea—*non-assumpsit*.

The putting up of a board for the purpose of letting houses by a person who built them and agreed to become tenant of them from a certain time, is sufficient to enable the person for whom they were erected to recover rent on a count for use and occupation.

It appeared that the houses were not finished till the latter end of September, 1828, being about three months after the time in the agreement; and that, on the 30th of

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that month a receipt was signed by the defendants in the following form:—

“Received, September 30th, 1828, of Mr. Daniel Sullivan 200*l.*, being the balance, in full of all claims, dues, and demands, for building four houses in Bedford-place, in the parish of Kensington, and for all party-walls and other appurtenances whatsoever.

Wm. Jones, *senr.*

Wm. Jones, *jnr.*”

The plaintiff, instead of paying the whole 200*l.*, deducted 42*l.*, being the amount of the first quarter's rent from Midsummer to Michaelmas, 1828. The defendants took the balance, but objected to the deduction; and one of them said, I will have nothing more to do with it, and left the keys on a chair in the plaintiff's house; but the plaintiff refused to accept them. It appeared, that, after the commencement of the quarter from Michaelmas to Christmas, a board was put up at the houses, containing the words “To let, inquire within, or at Mr. Jones's, 48, High Street, Kensington.”

Bompas, Serjt., for the defendants, contended, that, as there was no evidence of any offer to let, the plaintiff could not recover upon the special count. He also contended, that the putting up of the board was not sufficient evidence of use and occupation of the houses, so as to make the defendants liable on the other counts; and that, even if it were, the plaintiff had received all he was entitled to, as, in consequence of the contract money not having been paid at Midsummer, the rent ought only to commence from the subsequent quarter day.

BEST, C. J.—I am of opinion that the plaintiff is entitled to recover on the counts for use and occupation, as the putting up of the board was the assertion of a right of possession. I think that the plaintiff's not having paid the

money at Midsummer can make no difference in the case, because he was to pay when the houses were finished, and, as they were not finished till September, he was not obliged to pay before then. But the defendants were liable for rent from Midsummer, because they had agreed, at all events, to become tenants from that time.

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Verdict for the plaintiff, for 42*l.*, on the counts for use and occupation, and for the defendants on the other counts.

Wilde, Serjt., and *Payne*, for the plaintiff.

Bompas, Serjt., for the defendants.

[Attornies—*S. Robinson*, and *Bromley & Co.*]

TOWNE v. Lady GRESLEY.

Feb. 21st.

ASSUMPSIT for work and labour as an apothecary, and for medicines furnished. The plaintiff lived near Waterloo Bridge, and the defendant, in Conduit Street. The plaintiff had charged both for medicines and attendance.

An apothecary may either charge for his attendances or for the medicines he sends, but he cannot be allowed to charge for both.

Wilde, Serjt., submitted that the charge for attendances must be taken off, as an apothecary had no right to make any such charge.

BEST, C. J.—I am inclined to think that there is something in some of the acts of Parliament upon the subject of attendances; but if there is not any express provision, yet the practice is so inveterate that I cannot allow the plaintiff to charge in both ways. An apothecary may charge for attendances if he pleases, and then the Jury will say what is reasonable for those attendances, or he may charge for the medicine he sends, but he cannot be permitted to make a charge for both. I shall recommend

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the Jury, in the present case, to strike off the charges for attendance and make an allowance for the medicines only.

Verdict for the plaintiff.—Damages, 20*l*.

Jones, Serjt., and Hutchinson, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*W. H. King, and Sheriff.*]

This is the first case which has decided that an apothecary may charge for his attendances, provided he makes no charge for the medicine he furnishes. There has long existed in the profession a vague and undefined notion that an apothecary cannot charge for attendances. This may have arisen from the fact that an apothecary originally was only a compounder of medicines prescribed by a physician. There does not appear to be any express provision in any of the acts of Parliament upon the subject of attendances, and there is no doubt that the rule laid down by the learned Chief Justice, is, in the present state of the medical profession, the most

reasonable and the best that could be adopted, both for the practitioner and the patient. There are many cases which require both skill and attendance, but which do not require the administering of much medicine; and it is well known, in point of fact, that, when attendances are not charged for, much more medicine is often sent than the case actually requires, and also that the charge for medicines generally bears no proportion to the cost price of the drugs. By giving the apothecary the option of charging for medicines or attendances, according to the nature of the case, one of those inconveniences will be removed, and the other considerably diminished.

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*Adjourned Sittings in London, after Hilary Term,
1829.*

WRIGHT v. GIBON.

March 6th.

COVENANT, on articles of apprenticeship, by the master against the uncle of the apprentice, who had become bound for the due performance of the articles by his nephew. The declaration alleged, that the apprentice did not nor would faithfully and diligently serve the plaintiff as his apprentice during the term, according to the tenor and effect, true intent, and meaning, of the articles of agreement in that behalf, but wholly neglected so to do, and, on the contrary thereof, during the said term, to wit, on &c. did *unlawfully absent himself from the service of his master, &c.* The defendant pleaded, that the apprentice did faithfully and diligently serve, and *did not unlawfully absent himself, &c.*

From the evidence, it appeared that the apprentice, having received permission to be absent, stayed away on one occasion three or four days, and, on another, a week beyond the time allowed; but after this, on the application of his friends, the plaintiff received him back, but stipulated that he should be always in on a Sunday evening by eight o'clock. Notwithstanding this, on one Sunday evening, having been to see a friend, he did not return till twenty minutes past ten.

Jones, Serjt., for the defendant.—Within the meaning of a covenant of this description, and particularly as against a *surety*, it is not every little occasional absence (though they may be the subject of reprehension) that will constitute an *unlawful absents*.

BEST, C. J.—Perhaps the being away on a Sunday may

The staying out by an apprentice on a Sunday evening beyond the time allowed him, is not such an unlawful absents of himself as will enable his master to maintain an action of covenant against a person who became bound for the due performance of the indenture.

If an apprentice absent himself from his master, and his master take him back, and an action be afterwards brought for such absents, the taking back, to constitute a defence, must be specially pleaded.

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not be an unlawful absenting; but it appears that the apprentice was absent for three or four days on one occasion, and for a week on another. I think you cannot get over that.

Jones, Serjt.—But with respect to those instances, the master's conduct afterwards is a condonation of the offence.

Taddy, Serjt.—There is no plea to that effect.

BEST, C. J., was of opinion that the condonation must be pleaded specially, and, in his summing up, told the Jury, that an absence for half an hour beyond the proper time on a Sunday evening would not, in his opinion, be an unlawful absenting within the meaning of the covenant, as against the defendant, who was a surety, because the words had reference to an absenting from business.

Verdict for the plaintiff.

Taddy, Serjt., and *Busby*, for the plaintiff.

Jones, Serjt., and *Chitty*, for the defendant.

[Attornies—*Watson & B.*, and *Patten & Son.*]

OXFORD SPRING CIRCUIT.

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BEFORE MR. JUSTICE PARK & MR. JUSTICE J. PARKE.

BERKSHIRE ASSIZES.

BEFORE MR. JUSTICE J. PARKE.

REX v. WHEELER, TURNER, and DAVIS.

Mar. 6th.

SACRILEGE. The prisoners were charged with breaking into the parish church of Purley, and stealing two surplices and a scarf. It appeared that the surplices and scarf were stolen from a box kept in the church tower. This tower was built higher than the church, and had a separate roof, but it had no outer door, the only way of going into it being through the body of the church, from which the tower was not separated by a door or partition of any kind.

Sacrilege.—If a church tower be built higher than the church, and have a separate roof, but have no outer door, and be only accessible from the body of the church, from which it is not separated by any partition, this tower is a part of the church within the meaning of the stat. 7 & 8 Geo. 4, c. 29, s. 10.

The prisoner's counsel objected, that the stealing of articles deposited in the church tower was not sacrilege within the meaning of the 10th section of the statute 7 & 8 Geo. 4, c. 29, under which, to constitute the crime of sacrilege, it was necessary that the party should not only break into or out of a church or chapel, but should steal *therein* some chattel.

Mr. Justice J. PARKE.—I am of opinion that a church tower, circumstanced as this tower is, must be taken to be

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part of the church; and I shall hold, that the stealing of these articles in this tower is a stealing in the church, within the meaning of this act.

Verdict—Guilty (a).

Shepherd, and *Stone*, for the prosecution.

Justice, *Carrington*, and *Tyrwhitt*, for the respective prisoners.

[Attornies — *Blandy & Andrews*, for the prosecution; *Moggridge, Frankum, Compigné, & D.*, for the prisoners.]

(a) By the stat. 7 & 8 Geo. 4, c. 29, s. 10, it is enacted, "That if any person shall break and enter any church or chapel, and steal therein any chattel, or, having stolen any chattel in any church or chapel, shall break out of the same, every such offender, being convicted thereof, shall suffer death as a felon."

Russ. & R. C. C. R. 386, it was held, that to constitute the crime of sacrilege it was not essential that the articles stolen should be goods used for divine service. That case was decided on the stat. 1 Edw. 6, c. 12, s. 10, (now repealed), but it seems to be equally applicable to the provisions of the stat. 7 & 8 Geo. 4, c. 29, s. 10.

In the case of *Rex v. Rourke*,

(Civil Side.)

BEFORE MR. JUSTICE PARK.

LYONS v. GOLDING.

March 3rd.

A party cannot maintain trover against a constable for a wrongful taking of goods under a justice's warrant, without joining the justice as a defendant, if perusal and copy of the warrant have been given under the stat. 24 Geo. 2, c. 44, s. 6.

TROVER for pocket-handkerchiefs. Plea—General issue. It appeared that the plaintiff was a fruit salesman, and that the defendant, who was a constable, had entered the plaintiff's house, situate at Reading, under a warrant to search for stolen goods, and had taken away the articles in question; and that, after this, the plaintiff was

examined before the mayor of Reading as to the way in which he became possessed of these articles.

For the defence, a search warrant, under the hand and seal of the mayor of Reading, directing the defendant to search the plaintiff's house for stolen goods was put in; and it was shewn, that, under this warrant, the defendant had taken the articles in question. There had been a demand of perusal and copy of the warrant, which had been granted by the defendant.

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Talfourd, for the defendant, contended, that, as the defendant acted under the warrant of a justice of the peace, and had given perusal and copy of the warrant under the statute 24 Geo. 2, c. 44, s. 6,—there must be a verdict for the defendant, as the justice had not been joined in the action.

Tamton and *Curwood*, *contra*, argued, that that statute only applied to cases where a plaintiff sought to recover uncertain damages for a supposed injury, and not to cases where the party went merely to recover back the exact amount or value of money or property which had come to the constable's hands; and they contended, that, as it had been held that a party might recover in replevin or in an action for money had and received, without any demand of perusal and copy of the warrant; so he might likewise recover in trover, as in that form of action he would only obtain a verdict for the value of his goods.

Mr. Justice PARK.—Trover is an action in tort, for the recovery of damages; and I think that, to entitle a plaintiff to maintain such an action against a constable acting under a justice's warrant, he must demand perusal and copy of the warrant, under the stat. 24 Geo. 2, c. 44; and if perusal and copy be given, he cannot recover, unless he join the justice as a defendant.

Verdict for the defendant.

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Taunton, and *Curwood*, for the plaintiff.

Talfourd, for the defendant.

[Attornies—*E. Isaacs*, and *Blandy & A.*]

IN the ensuing Term, *Taunton*, moved to set aside the verdict; but the Court refused a rule.

By the stat. 24 Geo. 2, c. 44, s. 6, it is enacted, "that no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any Justice of the peace, until demand hath been made or left at the usual place of his abode, by the party or parties intending to bring such action, or by his, her, or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand; and in case after such demand and compliance therewith, by shewing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such constable, headborough, or other officer, or against such person or persons acting in his aid for any such cause as aforesaid, without making the Justice or Justices who signed or sealed the said warrant defendant or defendants, that on producing and proving such war-

rant at the trial of such action, the Jury shall give their verdict for the defendant or defendants, notwithstanding any defect of jurisdiction in such Justice or Justices; and if such action be brought jointly against such Justice or Justices, and also against such constable, headborough or other officer, or person or persons acting in his or their aid, as aforesaid, then, on proof of such warrant, the Jury shall find for such constable, headborough, or other officer, and for such person and persons so acting as aforesaid, notwithstanding such defect of jurisdiction as aforesaid; and if the verdict shall be given against the Justice or Justices, that in such case the plaintiff or plaintiffs shall recover his, her, or their costs against him or them, to be taxed in such manner by the proper officer, as to include such costs as such plaintiff or plaintiffs are liable to pay to such defendant or defendants for whom such verdict shall be found as aforesaid."

In B. N. P. 24, Mr. Justice *Buller* says, "This act only extends to actions of tort, and therefore, where an action for money had and received was brought against an officer who had levied

money, on a conviction by a justice of the peace, the conviction having been quashed, it was holden, that a demand of a copy of the warrant was not necessary;"

and in the case of *Fletcher v. Wilkins*, 6 Ea. 283, it was determined, that replevin was not an action within the meaning of the stat. 24 Geo. 2, c. 44.

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OXFORD ASSIZES.

BEFORE MR. JUSTICE PARK.

REX v. JAMES BARKER.

March 6th.

THE prisoner was indicted for having, on the 2nd day of December, 1828, committed a rape upon Mary Anne Saunders.

Curwood, for the prisoner, wished to ask the prosecutrix whether, since the time of the alleged rape, she had not walked the High Street at Oxford.

Mr. Justice PARK.—I have some doubt whether this would be evidence. In actions for criminal conversation, the conduct of the wife before the alleged adultery is no doubt highly material, and is clearly admissible, but not her conduct afterwards, because that may have been caused by the conduct of the party himself.

Curwood.—I submit that there is a distinction between the two cases. An action for criminal conversation is brought for the purpose of ascertaining the injury that the husband has received, but, in the present case, the only use of the question is to try the credit of the woman.

Mr. Justice PARK.—I have great doubt whether, since

of her being a street walker; but *semble*, that evidence of specific acts of criminality by her would not be admissible.

On the trial of an indictment for a rape, it was held that the prisoner's counsel might ask the prosecutrix the following questions, with a view to contradict her—"Were you not on— [since the time of the alleged offence] walking in the High Street, at Oxford, to look out for men?" "Were you not on— [since the time of the alleged offence] walking in High Street, with a woman reputed to be a common prostitute?"—Held also, that evidence might be adduced by the prisoner to shew the general light character of the prosecutrix, and that general evidence might be given

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the case of *Rex v. Hodgson (a)*, I can admit you to prove particular acts of criminality in the prosecutrix, though you may certainly give evidence of general lightness of character, and general evidence of her being a street walker.

Curwood, for the prisoner, wished to put the following questions with a view to contradict the prosecutrix. "Were you not, on Friday last, walking the High Street of Oxford, to look out for men?" and, "Were you not, on Friday last, walking in the High Street with a woman reputed to be a common prostitute?"

Mr. Justice PARK.—I will write down these questions, and ask my learned brother whether he thinks they can be put.

(a) In the case of *Rex v. Hodgson*, Russ. & R. C. C. R. 211, which was an indictment for a rape, the prisoner's counsel put these questions to the prosecutrix, —Whether she had not before had connexion with other persons? and whether she had not had connexion with a particular person named? *Wood*, B., held that she was not bound to answer these questions. The prisoner's counsel then offered to call a witness, to prove that the prosecutrix had been caught in bed with a young man, about a year before this charge, and offered to call the young man to prove that he had had connexion with her. But the learned Baron held that all this was not admissible, as it was evidence of particular facts not connected with the present charge. The twelve Judges confirmed this opinion of *Wood*, B., as to all the

points. In the case of *Rex v. Clarke*, 2 Stark. N. P. C. 241, it was held, that, where on an indictment for an assault with intent to commit a rape, the prosecutrix has been cross-examined as to crimes committed by her several years before the alleged offence, witnesses might be called to shew that her character had since been good; and in that case, *Holroyd*, J. observed, "In the case of an indictment for a rape, evidence that the woman had a bad character previous to the supposed commission of the offence, is admissible, but the defendant cannot go into evidence of particular facts. This is the law upon an indictment for a rape, and I am of opinion that the same principles apply to the case of an indictment for an assault with intent to commit a rape."

The questions were submitted to Mr. Justice *J. Parke*, and after they had been so, Mr. Justice PARK, said,—As my learned brother thinks they are legal questions, I shall allow them to be put.

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The questions were put, and both were answered in the negative.

The witness called to contradict the prosecutrix did not answer.

Verdict—Guilty (*a*).

Justice, for the prosecution.

Curwood, for the prisoner.

[Attornies—*Walsh*, and ———.]

(*a*) The prisoner was left for that the imputations made on the execution, but was afterwards character of the prosecutrix were pardoned, as it was discovered founded in truth.

WORCESTER ASSIZES.

BEFORE MR. JUSTICE PARK.

REX *v.* JOHN HUNTER.

March. 10th.

A BILL of indictment was presented to the Grand Jury, against Mr. Hunter, charging him with having uttered a forged deed of demise. The forgery imputed was by an alteration of the deed after it was executed. In several of

If on an indictment for forgery being presented to the Grand Jury, it appears that the forged instrument cannot be produced, the Grand

either from its being in the hands of the prisoner, or from any other sufficient cause, the Grand Jury may receive secondary evidence of its contents.

An indictment for forgery being presented to the Grand Jury, a witness declined to produce certain deeds before them:—Held, that, if the deeds form a part of the evidence of the witness's title to his own estate, he is not compellable to produce them, but that, if they do not, the Grand Jury may compel their production.

If the trial of an indictment for felony is postponed at the instance of the prisoner, on account of the illness of a witness, the prisoner is never required to pay the costs of the prosecutor.

Where the trial of a case of felony is postponed, the Court will not make any order for the expenses, till after the trial has actually taken place.

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the counts of the indictment, the deed was set out verbatim, and in others the deed was described, and only that part set out in which the alleged forgery was committed (a).

After the bill was presented to the Grand Jury, Lord Viscount Deerhurst, and the rest of the Grand Jurors, came into Court; and Lord Deerhurst stated, that a lady named Parratt, who was a witness on this indictment, had refused to produce certain deeds, which it was material for the Grand Jury to see; neither of these deeds being the deed alleged to be forged: and his lordship further stated, that the Grand Jury wished to know whether they could compel the production of these deeds.

Mr. Justice PARK.—I will confer with my learned brother on this point.

Mr. Justice PARK, (having conferred with Mr. Justice *J. Parke*), said.—My learned brother and myself are of opinion, that, if these deeds form a part of the evidence of this lady's title to any part of her own estate, you cannot compel her to produce them; but, if it should appear that they do not relate to the title of any part of her estate, she is bound to produce them before you.

Lord Deerhurst.—There is another question that the Grand Jury wish to be informed upon, which is this: the deed alleged to be forged, it appears, cannot be produced before us, it being in the possession of the party accused (b); and the Grand Jury wish to know, whether they can return a true bill for forgery, without the instrument alleged to be forged being produced before them.

(a) These counts were in the same form as the indictment in *Japhet Crook's* case. That case is reported in 2 Str. 901, and the form of the indictment will be found in Cro. Cir. Comp. 235, and 2 Stark. C. L. 506.

(b) Previously to the commencement of the assizes, the attorney for the prosecution had given Mr. Hunter notice to produce this deed before the Grand Jury, and also, in case a true bill should be found, to produce it at the trial.

Mr. Justice PARK.—If it appears to you, that the instrument alleged to be forged, either from its being in the possession of the prisoner, or for any other sufficient cause, cannot be produced before you, I am of opinion, that you may receive secondary evidence of its contents.

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The Grand Jury retired, and soon after returned into Court with a true bill against Mr. Hunter, for forgery.

Mr. Hunter having surrendered, his counsel applied to put off the trial, on affidavits stating the absence of a material witness. This application was not opposed, but—

March 11th.

Campbell, for the prosecution, stated that several witnesses in support of the charge had come from a great distance; and asked that the trial should be postponed on payment of costs by the prisoner, which he stated to be the constant practice in cases of assaults and other misdemeanors.

Mr. Justice PARK—I never knew an instance of a prisoner charged with a felony being put upon the terms of paying costs. It is never done.

Campbell, then applied for the usual order for the prosecutor's expenses, under the stat. 7 Geo. 4, c. 64, s. 22.

Mr. Justice PARK.—When a trial for felony is postponed, the practice is, not to allow the prosecutor his expenses, till the subsequent assize at which the trial comes on.

The trial was postponed and Mr. Hunter was admitted to bail (a).

(a) Mr. Hunter had been on bail previous to the finding of the bill, and his counsel wished to have the recognizances of his bail enlarged till the next assizes; but Mr. Justice Park said, that it could not be done, as this would be to increase the responsibility

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 Rex
 v.
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Campbell, Ludlow, Serjt., Curwood, and Godson, for the prosecution.

Taunton, Russell, Serjt., and C. Phillips, for the prisoner.

[Attornies—*E. W. & C. Oldaker, and Freeman.*]

of the bail, without their consent. All that the bail undertook for was, the appearance of the party at a given time, and, if he appeared at that time, their responsibility was at an end, unless they chose

to enter into fresh recognizances. The bail therefore entered into new recognizances for the appearance of their principal at the ensuing Assizes.

STAFFORD ASSIZES.

BEFORE MR. JUSTICE PARK.

March 15th.

RYDER v. MALBON.

In replevin, the defendant in his avowry stated that the distress was for rent arrear, and that the plaintiff held the lands on certain terms; however, on the plaintiff's lease being put in, it appeared that he held on other and different terms:—Held, that this variance was not amendable under the stat. 9 Geo. 4, c. 15.

Held, also that that act only applies to cases where

some particular written instrument is professed to be set out or recited in the pleading.

REPLEVIN. There were eighteen avowries for rent arrear. Pleas in bar, *non tenuit*, and *riens in arrear*.

The plaintiff held under a lease, granted to him by William Malbon, to whom the plaintiff claimed to be heir. This lease when produced, shewed that the terms of the plaintiff's holding were different from those stated in any of the eighteen avowries.

Peake, Serjt., applied to the learned Judge for leave to amend the record, contending that this was a variance caused by the mis-recital of a written instrument, and therefore amendable under the stat. 9 Geo. 4, c. 15.

Mr. Justice PARK.—This is not a case contemplated by

that act. There is no recital of any particular deed, it is a statement of the tenancy, which is really the whole case. If I were to suffer you to amend your avowries, they must be let in to plead *de novo*. All that cannot be done here.

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Peake, Serjt., and *R. V. Richards*, for the plaintiff.
Before the stat. 11 Geo. 2, c. 19, s. 22 (a), we must have recited the lease in our avowries, and then any mis-recital would have been clearly amendable. Now it would be a great hardship on the defendant, if he is not allowed to amend, merely because he uses the short form of pleading given by that statute, instead of reciting the entire deed in his plea.

Mr. Justice PARK.—I am most clearly of opinion that this case does not fall within either the spirit or the letter of this act of Parliament. I cannot allow you to amend.

Verdict for the plaintiff.

Mr. Justice PARK.—I am of opinion, that this act of Parliament only applies to cases where some particular written instrument is professed to be set out or recited in the pleading.

Campbell, and *J. Jervis*, for the plaintiff.

Peake, Serjt. and *R. V. Richards*, for the defendant.

[Attornies—*Read*, and *Hales*.]

(a) That sect. of the stat. 11 Geo. 2, c. 19, after reciting that great difficulties often arise in making avowries or conusance upon distresses for rent, proceeds to enact, "that it shall and may be lawful to and for all defendants in replevin to avow or make conusance generally, that the plaintiffs in replevin, or other tenants of the lands and tenements where-

on such distress was made, enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for incurred, which rent was then and still remains due;" "without further setting forth the grant, tenure, demise, or title of such landlord or landlords, lessor or lessors."

1829.

March 16th.

WYNNE v. ANDERSON and five Others.

If there be a joint action of trespass against six defendants, and the plaintiff prove a joint trespass committed by all, and then go on to prove another act of trespass by three of them, expecting to connect the other three with this also, but fail in so doing, the latter three are entitled to be acquitted before the defence is opened, as the plaintiff must be taken to have elected to waive the joint trespass, and to have gone on as against those three for the second act of trespass only.

If an action be brought against six, for a single act of trespass, and the plaintiff by his evidence only fix three of them, the Judge will not direct the other three to be acquitted, till all the evidence for the defence is gone through.

TRESPASS, against the six defendants, for breaking and entering the plaintiff's house, and taking his goods, and converting them to their own use. Plea—General issue.

The evidence on the part of the plaintiff went to shew, that all the six defendants assisted in taking the goods; and the plaintiff's counsel were going on to shew that two of the defendants sold them, a third receiving the proceeds of the sale.

Campbell, for the defendants, objected to evidence being given of any act respecting the sale by two of the defendants, and receipt of the money by the third, unless the plaintiff's counsel would abandon the case as to the other three who were proved to have been absent at the time of the sale.

Taunton, contra, stated that he expected by other evidence to connect the three remaining defendants with the sale.

The evidence was received, but none of the plaintiff's witnesses proved any thing to connect these three defendants with the sale.

Campbell, at the close of the plaintiff's case, asked to have them acquitted.

Taunton, for the plaintiff.—In cases of trespass, where the plaintiff has by his evidence affected only some of the defendants, the practice has always been not to take an acquittal of the others as soon as the plaintiff has closed his case, but to let the whole of the evidence be gone through on both sides, to see whether the remaining de-

defendants are not affected by the witnesses for the defence. This rule I have heard laid down by Mr. Justice *Le Blanc* in several cases.

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Campbell, for the defendants.—If this plaintiff meant to recover against all the six defendants for the joint trespass, he was not at liberty to go into evidence of any thing respecting the sale, as that was the act of three only. By doing that, I submit that he must be taken to have abandoned the case as against the other three.

Mr. Justice PARK.—I think that this case is very distinguishable from those in which several persons are charged with a single act of trespass, but in which the plaintiff, by his evidence, does not reach the whole number of defendants, because here the plaintiff, having proved one joint trespass against all, abandons that, and goes into evidence of a wrongful sale, in which only three of the parties were in any way concerned. Now, I think that, by doing so, the plaintiff must be taken to have elected to proceed against those three only, and to have abandoned the other three. That being so, I think that those other three defendants have a right to be acquitted before the other defendants go into their case.

Three of the defendants were accordingly acquitted, and

Campbell, addressed the Jury, on behalf of the other three.

Verdict for the plaintiff, against the three defendants who were concerned in the sale of the goods.

In the case of *Bonser v. Curtis* and Others, Sitt. after M. T. 1820, (MS.) *Abbott*, C. J., observed, that it is a matter of discretion with the Judge, whether the Jury

shall, in the middle of the cause, acquit a particular defendant, against whom there is no case made out, to make him a witness for the others.

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v.

ANDERSON.

Taunton, and C. Phillips, for the plaintiff.

Campbell, and Whateley, for the defendants.

[Attornies—Whalley, and Passman.]

SHROPSHIRE ASSIZES.

BEFORE MR. JUSTICE PARK.

March 21st.

REX v. JOHN PIKE, and MARY his Wife.

A declaration, *in articulo mortis*, made by a child only four years old, is not admissible in evidence, on the trial of an indictment for the murder of such child, because a child of such tender years could not have had that idea of a future state which is necessary to make such a declaration admissible.

THE two prisoners were indicted for the wilful murder of their niece, Elizabeth Pike, a child aged four years, by beating on the head.

Shortly before her death, the child made a statement to her mother, as to the manner in which she had been treated by the two prisoners.

J. Jervis, for the prosecution, offered to give this declaration in evidence, if the Learned Judge should think it admissible as a declaration *in articulo mortis*.

Mr. Justice PARK.—We allow the declaration of persons *in articulo mortis* to be given in evidence, if it appear that the person making such declaration was then under the deep impression that he was soon to render an account to his Maker. Now, as this child was but four years old, it is quite impossible that she, however precocious her mind, could have had that idea of a future state which is necessary to make such a declaration admissible. In the deposition of the mother, to whom this declaration was made, I find it stated, that the deceased asked the deponent to lie down by her, which she did, and that, on the child's asking her how long she would lie by her, the

deponent replied that she would lie by her till she got up; and that, upon her saying this, the deceased said that she should never get up any more; and then went on to tell her mother of something that had happened. Now this, though it shews that the deceased thought she was dying, does not shew that she had any idea of a future state; indeed I think, that, from her age, we must take it that she could not possibly have had any idea of that kind. I thought, when I read the depositions, that this declaration was not admissible, and I so told the Grand Jury. Since that, I have mentioned the point to my learned brother (Mr. Justice *J. Parke*), and also the ground on which I had formed my opinion, and he quite agrees with the view I have taken of the case.

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v.
PIKE.

Verdict—Not Guilty.

J. Jervis, for the prosecution.

In the case of *Rex v. Hucks*, 1 Stark. N. P. C. 523, Lord *Ellenborough* says, that, where a declaration has been made by a party in *articulo mortis*, the question whether, under all the surrounding circumstances, such declaration is admissible in evidence, is a question entirely for the consideration of the Court; and his Lordship added that the point had been

considered by the Judges on a question proposed to them by the Judges in Ireland, and that this was their unanimous opinion. As to the cases in which declarations in *articulo mortis* are admissible, and as to what are to be considered as declarations in *articulo mortis*, see 1 Phill. Law of Evid. 235, and 85; and Carr. Supp. 232.

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HEREFORD ASSIZES.

BEFORE MR. JUSTICE J. PARKE.

Mar. 24th.

REX v. CHARLES ADAMS.

If the *only evidence* against a prisoner charged with a larceny, be, that stolen property was found in his possession three months after the loss of it, the Judge will direct an acquittal, without calling upon him for his defence.

THE prisoner was indicted for a larceny, in stealing an axe, a saw, and a mattock, the property of Joseph Powell.

The prosecutor proved that he missed the tools on a certain day, and another witness proved that he found them in the possession of the prisoner three months after they were missed.

Mr. Justice J. PARKE directed an acquittal, without calling on the prisoner for his defence, observing, that a possession of stolen property three months after it was lost, was not such a recent possession as to put the prisoner upon shewing how he came by it, unless there was evidence of something more than the mere fact of the property being in his possession at that distance of time after the loss of it.

Verdict.—Not Guilty.

Vide ante, Vol. 2, p. 452.

MONMOUTH ASSIZES.

BEFORE MR. JUSTICE PARK.

Mar. 30th.

REX v. EDWARD BARNETT.

The Court will direct money found upon a prisoner to be restored to him before trial, if it appear by the depositions that it is in no way material to the charge on which he is to be tried.

THE prisoner had been committed, on the coroner's inquisition, on a charge of murder, and, on the first day of

before trial, if it appear by the depositions that it is in no way material to the charge on which he is to be tried.

the Assize, *Curwood*, for the prisoner, stated, that a sum of 31*l.* 15*s.*, which had been found in the pocket of the prisoner, was in the hands of a constable; and he stated, that this sum of money was in no way material to the charge against the prisoner, nor was it alleged that the money had been stolen from any person; under these circumstances, he applied to the learned Judge to order that it should be returned to the prisoner before the trial, as, without this money, he had not the means of defraying the expenses of his defence.

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Mr. Justice PARK.—I have read the depositions, and I find that this sum of money is not in any way material as evidence on the charge made against the prisoner. I shall therefore order it to be delivered to him forthwith; and the constable who has the money must go to the gaol and deliver the amount into the prisoner's own hand.

This was accordingly done.

Russell, Serjt., and *Justice*, for the prosecution.

Curwood, and *Carrington*, for the prisoner.

[Attornies—*T. & W. A. Williams*, and *Owen*.]

We are informed that *Barrington*; the celebrated pickpocket, made a similar application, at the Old Bailey, at the time of his arraignment on a charge of larceny from the person; and that *Eyre*,

C. B., directed the money found upon him to be forthwith restored, as it did not appear by the depositions that it was in any way material to the charge on which he was to take his trial.

1829.

March 30th.

REX v. DAVID BOWEN.

If the names of the Jurors be not set out in the caption of a coroner's inquisition, and the inquisition be not signed by the Jurors with their names at length, the inquisition is bad. If some of the jurors sign with their marks, such marks ought to be verified by an attestation.

MANSLAUGHTER. The coroner's inquisition was in the following form:—" Monmouthshire, to wit, an inquisition indented, taken for our Sovereign Lord the King, at the house of J. G., in the parish of L., in the county of M., on Monday, the 22d day of September, in the 9 Geo. 4, before E. H. P., gentleman, one of the coroners of our said Lord the King, for the said county, on view of the body of David Lewis, then and there lying dead, upon the oath of the several persons whose names are hereunder written and seals affixed, good and lawful men of the said county, duly chosen, and who, being then and there duly sworn and charged to inquire for our said Lord the King, when, how, and by what means the said David Lewis came to his death, do, upon their oath, say that David Bowen, late of &c., on &c., with force and arms &c., in and upon &c., did make an assault." The inquisition then went on to charge a death by beating, and was signed with five names at length, besides that of the coroner, and with five signatures, and two marks, in the following form:—

Jno. Samuel.
Abm. Rosser,
Saml. Deakin,
Edmd. Smith.
Thom. Gregory.

The mark of
+
William James.
The mark of
+
Richard Morgan.

Busby, for the prisoner.—I submit, that this inquisition must be quashed. The first objection is, that the names of the jurors do not appear in any part of the inquisition, they are not set forth in the body of the inquisition, and the signatures are several of them abbreviated; so that the names of the jurors nowhere appear at length. There is also another objection, which is this, that two of the jurors

are marksmen, and have made their mark; now I submit, that these marks ought to have had an attestation.

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Mr. Justice PARK.—I see the letters Edmd. put before one of the surnames. How can I say that that must mean Edmund? It may mean Edmead. It often happens that persons are baptized by surnames. With respect to the marks, I certainly think that they ought to have been verified by an attestation. It appears to me that the inquisition is bad upon both points.

Inquisition quashed.

Watson, for the prosecution.

Busby, for the prisoner.

[Attornies—*Gabb*, and *T. & W. A. Williams*.]

GLOUCESTER ASSIZES.

BEFORE MR. JUSTICE J. PARKE.

REX v. THOMAS HIGGINS.

April 6th.

THE prisoner was charged with a larceny, in stealing two yards of woollen cloth, the property of John Cornock.

It appeared, that the prosecutor was at an inn at Berkeley, and that, having the piece of cloth with him, he left it on a chair in one of the rooms of the inn while he went out, and that on his return he missed the cloth. It was proved, that, in about four hours after the loss of the cloth, the prisoner sold it at a place eight miles distant from Berkeley. The statement of the prisoner, made before the Magistrate, was read as evidence on the part of the prosecution. In this the prisoner said, "that the cloth was honestly bought and paid for!"

If a prosecutor gives in evidence a declaration made by a prisoner, it becomes evidence for the prisoner, as well as against him, but, like all other evidence, the Jury may give credit to one part of it and not to another.

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Mr. Justice J. PARKE (in summing up).—In this case the prosecutor has given evidence of what the prisoner said before the Magistrate. Now, what a prisoner says is not evidence, unless the prosecutor chooses to make it so, by using it as a part of his case against the prisoner; however, if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner, as well as against him; but still, like all evidence given in any case, it is for you to say whether you believe it. If you believe that the prisoner really bought and paid for this cloth, as he says he did, you ought to acquit him; but if, from his selling the cloth so very soon after it was lost, and that, too, at a distance of eight miles, you feel satisfied that the statement of his buying it is all false, then you must find him guilty.

Verdict—Guilty.

Carrington, for the prosecution.

[Attornies—*Croome & Smith.*]

HOME SUMMER CIRCUIT.

1828.

BEFORE LORD TENTERDEN, C. J. & MR. BARON GARROW.

KENT ASSIZES.

BEFORE MR. BARON GARROW.

REX v. JAMES SCUDDER.

INDICTMENT on the statute 43 Geo. 3, c. 58, s. 2 (a).
The *first* count of the indictment charged that the priso-

On an indictment for administering a drug to a woman to procure

abortion, *she not being quick with child*, if it appear that the woman was not with child at all, the prisoner must be acquitted, although it appear that the prisoner thought that she was with child, and gave her the drug with an intent to destroy such child.

(a) The stat. 43 Geo. 3, c. 58, is wholly repealed by the stat. 9 Geo. 4, c. 31; however, by sect. 10 of the latter stat. it is enacted, "That if any person, with intent to procure the miscarriage of any woman *not being, or not being proved to be, then quick with child*, unlawfully and maliciously shall administer to her, or cause to be taken by her, any medicine or other thing, or shall use any instrument or other means whatever with the like intent, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be

transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment."

Although this decision was under the stat. 43 Geo. 3, c. 58, it is equally applicable to the provisions of the stat. 9 Geo. 4, c. 31, s. 10, as the passage above set forth in italics is *verbatim* the same in both statutes.

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ner did administer (a) to one Susan Clouder a large quantity of a certain drug called oil of savin, with intent to procure a miscarriage, she, the said S. C. at the time, &c., "being with child, but not quick with child." The *second* count charged that it was administered to her, "she, the said S. C., at the time, &c., not being quick with child." There were two other counts stating it to be "a certain mixture to the jurors aforesaid unknown," instead of stating it to be oil of savin (b).

It appeared in evidence (c) that the prisoner, who had had connexion with Susan Clouder, had given her a bottle containing some liquid, which she drank, and that, upon her asking the prisoner why he had given it, he said, "to kill the little one." She however admitted, on cross-examination, that she had never been with child at all.

Steer, for the prisoner, submitted, that, on this evidence, the prisoner was entitled to be acquitted, as no miscarriage could possibly have been produced.

J. 'Espinasse, contra, relied on the case of *Rex v. Phillips* (d), and contended, that the offence was complete if

(a) In the case of *Rex v. Cadman*, Carr. Supp. 237, which was an indictment for administering poison to E. D., with intent to murder her, the proof was, that the prisoner gave her a bit of cake which contained arsenic and sulphate of copper. She put this into her mouth and spit it out, but did not swallow any part. This was held to be not sufficient; and the twelve Judges decided that it was not an administering unless the poison was taken into the stomach.

(b) The form of the indictment will be found in Arch. C. L. 235.

(c) In the case of *Rex v. Hutchinson*, 2 B. & C. 608, n., it was

held, that on an indictment for this offence, the dying declaration of the woman to whom the drug was administered is not admissible in evidence.

(d) 3 Camp. 76. In that case, where the indictment was similar to that in the present case, *Lawrence, J.*, said, "It is immaterial whether the shrub was savin or not, or whether or not it was capable of procuring abortion, or even whether the woman was actually with child; if the prisoner believed at the time that it would procure abortion, and administered it with that intent, the case is within the statute."

the drug were given with an *intent* to procure abortion; and that here the intention was evident, as the prisoner said that he had given it "to kill the little one."

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GARROW, B., expressed a doubt as to the authority of the case cited, and having conferred with Lord *Tenterden*, C. J., his Lordship left the case to the Jury, who found the prisoner

Guilty.

GARROW, B., then reserved the case for the consideration of the twelve Judges; who held the conviction wrong, and decided, that, to constitute this offence, it was necessary that the woman *should be with child*.

CASES

AT

NISI PRIUS.

COURT OF KING'S BENCH.

*Third Sitting at Westminster, in Easter Term
1829.*

BEFORE LORD TENTERDEN, C. J.

1829.

May 29th.

BARWISE v. RUSSELL.

If, in an action on a bond against a surety, nonpayment by the principal, after a notice in writing required by the condition, be averred in the declaration, and the defendant suffer judgment by default, it is not necessary to give evidence of the notice, because the allegations of the declaration are not put in issue. If the breach be assigned under the statute on the record after judgment—*Semble*, that it will be otherwise.

THE plaintiff declared against the defendant as administratrix *de bonis non* of William Weston, deceased. The declaration was upon a bond entered into by one William Strickland, and the said William Weston, whereby they became bound in the sum of 2000*l.*, the said W. S. to the full extent of that sum, the said W. W. to the extent of, but not exceeding, 600*l.* The declaration then stated the condition, which (after reciting that W. S. was indebted to Weston Barwise, deceased, and the said plaintiff, for money lent, &c.) was, that, if the said W. S. should, within three calendar months after he should be required in writing so to do, pay the said sum of 600*l.*, then the bond should be void. There was a proviso that the said W. W. should not be liable to pay in his life-time, nor his executors till six months after his death; and also that he should not be liable to pay any interest. The declaration then averred, that *notice in writing was given to the said William Strickland, but that he did not, within three calendar months after he was required so to do, pay the said*

sum of 600*l.*; and that six months had elapsed since the death of the said W. W., whereby an action had accrued, &c.

The defendant suffered judgment by default, and the cause came before Lord TENTERDEN, C. J. upon a writ of enquiry.

The bond was produced in Court and read. The cause was not defended, and his Lordship, after some consideration, was of opinion that the evidence given was all that was required. His Lordship observed, that, if it had been a case in which breaches had been suggested under the statute upon the record *after judgment*, he should have thought it necessary to prove the notice to Strickland; but, as the breach was assigned *in the declaration*, the averments of which the defendant had not put in issue, it was unnecessary to enter into such proof.

The damages were accordingly assessed at 600*l.*

T. Peake, for the plaintiff.

[Attornies—*T. Wany* and *Person*.]

In the case of *Hodgkinson v. Marsden*, 2 Camp. 121, there was a suggestion of the condition of a bond entered on the roll after judgment on demurrer, and it was successfully contended by the defendant's counsel that it was necessary, in addition to the production of the bond, to shew that it was the same bond as that upon

which the judgment was obtained, because the defendant, upon that state of the record, had had no opportunity of controverting the facts stated in the suggestion. It was admitted, that it would have been otherwise if the condition of the bond had been set out in *the declaration*.

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BARWISE
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Sittings at Westminster, after Easter Term, 1829.

BEFORE LORD TENTERDEN, C. J.

June-3rd.

DOX, on the demise of HUGHES, v. DYBALL.

If, in an ejectment, it be proved that the lessor of the plaintiff let the *locus in quo* to a tenant, who held peaceable possession for about a-year: this is sufficient evidence of title as against a party who came in the night and forcibly turned such tenant out of possession.

EJECTMENT, to recover part of a house, situate in the parish of St. Luke, Middlesex. The lessor of the plaintiff sought to recover a room, which was a part of the Boot public-house, in Grub Street, of which the defendant had obtained possession. On the part of the lessor of the plaintiff, a release, dated, the 13th day of November, 1818, was put in. By this, Lord Reay and others joined in conveying the Boot public-house, to the lessor of the plaintiff, and a witness was called, who stated, that he had been a tenant of the lessor of the plaintiff; and that, in the year 1826, the lessor of the plaintiff let the Boot public-house to him, and that he received the key of this room, which had a separate outer-door; and he further stated, that he held peaceable possession of this room with the rest of the premises, till some day in the month of November, 1827, when the defendant and a number of other persons, came at about three o'clock in the morning, and broke into it, taking forcible possession.

Chitty, for the defendant, objected that this was no evidence of a possession under the deed of conveyance, as that was dated in the year 1818, and this tenant did not come in till 1826.

LORD TENTERDEN, C. J.—Suppose there had been no deed at all put in. We find that, in 1826, a tenant of the lessor of the plaintiff, had the key delivered to him, when he went in, and that he had peaceable possession of this room, till the defendant came in November, 1827. That

is sufficient proof of title as against a man who comes and takes forcible possession at three o'clock in the morning. The plaintiff is entitled to a verdict.

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DYBALL.

Verdict for the plaintiff.

Gurney, and *Busby*, for the lessor of the plaintiff.

Chitty, for the defendant.

[Attornies—*H. Hughes*, and *Richardson*.]

FELTON v. GREAVES, and Another.

June 6th.

CASE for the infringement of a patent, for "a machine for an expeditious and correct mode of giving a fine edge to knives, razors, scissors, and other cutting instruments."

Plea—General issue. The patent and specification were put in, and the latter described a machine for sharpening cutting instruments, by passing their edges backward and forward in an angle formed by the intersection of two circular files. The specification also stated that other materials besides steel might be employed, according to the delicacy of the edge required.

One of the machines was produced; it contained two steel rollers about four inches long, formed with bosses and recesses; the bosses or elevated parts of one roller, passing into the recesses of the other, and by those means forming an acute angle between them. The bosses of both rollers were files, and the recesses smooth.

This machine was proved to be useful in the sharpening of knives, but it appeared that if both rollers were files, it would not do for scissors, and that for scissors, one of the rollers should be quite smooth; however, the witnesses stated, that if Turkey stones were used for both the roll-

A patent was granted for a machine to sharpen knives and scissors, and, in the specification, this was directed to be done, by passing their edges backward and forward in an angle formed by the intersection of two circular files; and in the specification it was also stated, that other materials might be used according to the delicacy of the edge. It was proved that, for scissors, there ought to be one circular file, and a smooth surface, but that two Turkey stones might also succeed:—Held, that the specification was bad, as it neither directed the

machines for scissors to be made with Turkey stones nor to be made with one circular file and a smooth surface.

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ers, instead of steel, it would be possible to sharpen scissors with a machine so constructed.

J. Williams, for the defendant.—According to this specification, both rollers should be of equal roughness, but, as it appears that one class of the instruments, namely the scissors, require that the two rollers should be different, which is a thing not stated in the specification, I have to submit that the specification is not good.

Lord TENTERDEN, C. J.—I am of opinion, that this objection must prevail. The specification describes both the rollers as files, and, on reading it with attention, I cannot find that the scissor sharpener is described as having the two rollers different. It appears to me, therefore, that the specification is insufficient, as it no where states that the rollers for scissors must be one rough, and the other not. With respect to constructing the rollers with Turkey stone, I cannot find that it is anywhere stated in the specification, that Turkey stones used on both sides, will do for scissors. The plaintiff must be called.

Nonsuit.

Sir *J. Scarlett*, A. G., *Brougham*, and *Rotch*, for the plaintiff.

J. Williams, and *Milner*, for the defendants.

[Attornies—*F. Jeyes*, and *Rodgers*.]

See the cases of *Lewis v. Davis*, ante, Vol. 1, p. 558, and Vol. 2, ante, p. 502. *Crossley v. Beverley*, Add. p. vi.
ante, p. 513, and *Bloxam v. Elsee*,

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June 6th.

DOE on the demise of WHEELDON v. PAUL.

EJECTMENT for a house, in the parish of St. George, Hanover Square. This ejectment was brought upon a clause of re-entry, contained in a lease, by which it was provided, that, if the rent, which amounted to 75*l.* *per annum*, payable quarterly, should be in arrear for twenty-one days, the lessor should have a right to re-enter.

To dispense with proof of the execution of the lease by the subscribing witness, a person was called, who proved his hand-writing, and stated that the subscribing witness went abroad about two years before, but that he did not know what had become of him since. The lease purported to be signed by the mark of the defendant. In addition to this proof, another witness was called, who stated, that the defendant had spoken of having sixteen years to come of the term granted by the lease.

Lord TENTERDEN, C. J., held, that, on this evidence, the lessor of the plaintiff was entitled to have the lease read.

The plaintiff's attorney proved, that, on the 25th of March (the quarter day), he accompanied the lessor of the plaintiff to the premises, when the lessor of the plaintiff asked for the rent, but was not paid; and he further stated, that they went again on the 15th of April (which was the last of the twenty-one days given by the lease for payment after the rent became due), and that they again demanded the rent of the defendant, who did not pay them. In his cross-examination he said, that the sum demanded was 193*l.* 10*s.*, and that the demand on the 15th of April was made at about one o'clock in the day.

In ejectment to recover demised premises for non-payment of rent, under the usual proviso for re-entry on non-payment for twenty-one days, it appeared that the rent was payable quarterly, and that a demand of more than one quarter's rent was made on the 21st day at 1 o'clock:—Held that *only one quarter's rent* should have been demanded, and that at sunset.

A lease purported to have been signed by the mark of the party; a person proved the hand-writing of the subscribing witness, and that he had gone abroad, and another person proved that the defendant had spoken of the term that he had under the lease:—Held, that this was sufficient proof of the execution of the lease by the defendant.

Steer, for the defendant.—I submit that the demand proved is not sufficient to support the plaintiff's case. At

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common law a tenant who has to pay rent, has till sunset of the day on which it is demandable; and unless the demand be made at the last hour of the day, it is insufficient.

Lord TENTERDEN, C. J. (stopping *Steer* for the defendant)
 —There are two objections in this case—*First*, that the plaintiff has demanded a larger sum than he ought if the non-payment was to work a forfeiture. The rent is 75*l.* a year, payable quarterly; and the demand should have been of a *quarter's* rent only: whereas the lessor of the plaintiff demanded 193*l.* 10*s.* *Secondly*, the demand ought to have been made at the last hour of the day, at sunset; for the tenant has till then to make payment; and the demand, to work a forfeiture, should be made at the time when the tenant is bound to pay. I speak with perhaps more confidence on this subject, because I remember that very early in my professional life, I had occasion to consider this question, and I wrote a much more elaborate opinion than I should think of delivering now, and it so happened that that opinion came before a gentleman very eminent at the bar (Mr. Erskine), who was pleased to compliment me upon it. I mention this circumstance, to shew in what manner this subject has been impressed on my mind.

Nonsuit.

Denman, and *Follett*, for the lessor of the plaintiff.

Steer, for the defendant.

[Attornies—*Hurley*, and *Burgess*.]

In the ensuing Term, *Denman* moved to set aside the nonsuit; but the Court refused a rule.

The authorities on this subject will be found collected in 1 Wms. Saund.
 287, n. 16.

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Adjourned Sittings in London, after Easter Term,
1829.

The Right Honourable Sir L. SHADWELL, Knight, *v.* June 11th.
HUTCHINSON.

THE *first* count of the declaration stated, that the plaintiff, on the 22nd day of November, 1822, demised a certain messuage and premises in the parish of Saint Alphage, London, to one John Daniel Gower, for a certain term of years not yet expired, the reversion thereof, after the expiration of the said term, belonging to the said plaintiff. It then went on to aver, that, also, before and at the time &c., there was and now is, and of right ought to be, in the said messuage, a certain ancient window, through which the light and air for and during all that time ought to have entered and come, and still of right ought to enter and come, from a certain open and uncovered place or space situate and being in London aforesaid, and next and adjoining to the said messuage, into a certain room or apartment in and parcel of the said messuage, for the convenient and wholesome use, occupation, and enjoyment thereof; yet the defendant, well knowing the premises, but contriving, &c., to injure, prejudice, and aggrieve the said plaintiff in his reversionary estate, &c., during the continuance of the said term, and whilst the said plaintiff was interested, &c., to wit, on the 1st of January, 1824, and on divers other days and times between that day and the exhibiting of the bill, &c., wrongfully and unjustly, without the leave or licence, and against the will, of the said plaintiff, put, fixed, and placed, and caused, &c., to be put, &c., close and next adjoining to the said messuage, *a certain roof or cover above and over the said open and uncovered place or space*, and higher up than the said window, and thereby *roofed in and covered over* the said place or space higher up than the said window, and wrongfully, &c., kept the said roof

The custom of London, which allows a man to build to any height upon ancient foundations, although he may darken his neighbour's lights thereby, must be confined to cases where all the four walls of the building belong to the party, and will not justify him in raising an obstruction by means of three walls of his, so as to darken the lights in a fourth wall belonging to his neighbour.

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or cover so put, &c., and the said place or space so roofed, &c., for a long space of time, &c. By means whereof the said room or apartment, &c., was, and still is, greatly darkened, &c., and thereby the said room hath been rendered close, uncomfortable, unwholesome, and unfit for habitation, &c. The concluding averment stated, that the plaintiff, by means of the said several premises, was greatly injured, prejudiced, and aggrieved in his reversionary estate, &c.

There were other counts, stating the complaint in a different manner, and one which charged the defendant with having cut, broken, and made divers large holes and apertures in one of the walls, and put pieces of timber and wood in them, whereby the house was damaged and the plaintiff injured in his reversionary interest (a).

Plea—The general issue.

The plaintiff sued as a trustee.—To prove the antiquity of the window, a witness was called who was sixty-seven years of age, and he proved that he served his apprenticeship in the house in question; that the window was very high up in the wall of the room, and had a table under it, at which they worked, and that the window then had the appearance of being very old. The obstruction was occasioned by a skylight roof in a yard between the house in question and that occupied by the defendant. There had been a similar skylight before, but it was then so placed in a slanting position as to be below the window in question, and therefore not to darken it. The skylight complained of rested on two side partitions crossing the yard, one of which had been raised so as to bring the skylight across the window in question, and to obstruct about half of it. The plaintiff's witnesses said, that the support of the former skylight was by a partition of wood, and that the brick wall was a new erection. They, however, ad-

(a) It was stated to be a matter of dispute, whether the holdfasts in the wall of the plaintiff's house were ancient or not; but, from the

turn which the cause took, the consideration of that question became unnecessary.

mitted, on their cross-examination, that the obstruction might easily be removed in the course of two or three days.

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J. Williams and *Curwood*, for the defendant, first contended, that the injury was not such as to entitle the reversioner to maintain an action.

Lord TENTERDEN, C. J.—I have no doubt that this is a case in which the reversioner may maintain an action, because it is an injury to *the right* that he complains of; and the effect of letting the obstruction stand might be, that, from the death of witnesses, evidence of its erection might be lost, and so the injury would become permanent (*a*).

J. Williams then opened, that he should be able to prove, that, in the yard in question, there was originally a brick wall, having every appearance of being ancient, upon which the original skylight rested, and that the defendant had only raised that wall, and consequently the skylight, as he might legally do within the city, according to the custom of London, which allows a man to build to any height upon ancient foundations, even though he should

(*a*) In the case of *Jesse v. Gifford*, 4 Burr. 2141, which was an action for erecting a wall, whereby the plaintiff's lights were obstructed, the plaintiff, in one of the counts, declared as the reversioner, and a verdict was found for the plaintiff, with general damages.

Mr. Serjeant *Burland* moved in arrest of judgment, on the ground, that the action would not lie by a reversioner, being only an injury to the person in possession. He obtained a rule to shew cause, but, when it came on to be argued, Mr. Justice *Aston* mentioned a case of *Tomlinson v. Brown*, decided in Easter Term, 1755. There-

in a similar action, it had been argued for the defendant, that a temporary nuisance could not be an injury to the inheritance, as it might be abated before the estate came into possession, and that a contrary construction would render the party liable to a double action. On the other hand, it was contended, that the obstruction would lessen the value of the reversion on a sale. The Court were of opinion that an action might be maintained both by the reversioner and the tenant; and upon the authority of this, the rule of Mr. Serjeant *Burland* was directed to be discharged.

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darken his neighbour's lights thereby. He referred to Bohun's *Privilegia Londini*, p. 54, title, "Concerning building on old foundations, and stopping of lights, in the city of London (a)."

(a) It is there said: "It is warrantable, by the custom of London, to rebuild any house upon the old foundation where the ancient house stood, in height at the pleasure of the party, although, by rebuilding, the lights of his neighbour be stopped up, unless there be some writings to the contrary." The case of *Reginald Hughes* is mentioned as deciding the following points, *viz.* "That the custom of London will not enable a man to erect a new house upon a void space of ground, whereby the ancient lights of an old house are stopt up;" and also, "that, if the new house be only erected on the ancient foundation, without any enlargement, either in longitude or latitude, howsoever it be made so high that it stoppeth up the lights of the old house, yet he is not subject unto any action, because the law authorizes a man to build as high as he may upon an ancient foundation." The author adds, "and agreeing to this seemeth 4 Ed. 3, 150, to be, where an assize of nuisance was brought for erecting a house so high that the light of the plaintiff, in the next adjoining house, was disturbed by it." Upon this particular custom see also the case of *Plummer v. Bentham*, 1 Burr. 248, where the two following customs were pleaded:—*First*, "That, if any person has a messuage or house in the city of London adjoining or contiguous to another messuage or house, or to the an-

cient foundations of one, in the said city, which former house has ancient lights or windows fronting opposite to or over such other adjoining or contiguous messuage or house, or ancient foundation of one; such other person, owner of the latter messuage or house, or ancient foundation of one, may well and lawfully exalt such his messuage or house, or rebuild, upon the ancient foundations of such his adjacent or contiguous messuage or house, any new messuage or house, to any height that he shall please, against and opposite to the said ancient lights and windows of such first mentioned neighbouring messuage or house, to which his messuage or house or ancient foundations of a messuage or house, are so contiguous or adjoining, and thereby darken and obscure such ancient lights and windows of such first mentioned neighbouring house, having such ancient lights and windows, unless there has been some writing, instrument, or record of an agreement or restriction to the contrary." The second custom pleaded was similar to the first, substituting the words *erection or building* for the words *messuage or house*. On these pleas issue was joined, and writs of *certiorari* were directed to the Mayor and Aldermen to certify whether there were such customs or not: and Sir William Morton, Knight, Recorder of London, certified, *ex tenore*, by command of the Lord Mayor and Aldermen, that there

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Lord TENTERDEN, C. J.—Suppose you prove your case as you have stated it, I do not think that it will be any answer to this action. I am of opinion that the custom must be confined to building on ancient foundations, where all the four walls belong to the party. In this case you come close to the plaintiff's house and raise the skylight against it, which I think you are not entitled to do. I give no decided opinion as to the legality of the custom, but I should think, that, in order to support it, the walls which are raised must be very old, at least as old as the lights which they obstruct. However, I wish not to be considered as deciding that question now. The verdict must be for the plaintiff.

Verdict for the plaintiff.—Damages, 1s. (a).

Taunton and Coleridge, for the plaintiff.

J. Williams and Curwood, for the defendant.

[Attornies—*Lake & Co.*, and *Eicke*.]

was such a custom as that alleged in the *first* plea, but not such a custom as that alleged in the *second*. The Reporter adds in a note, that "a consultation was had in the city, concerning the sort of gown which it was proper for the Recorder to put on, to make this *ore tenus* return; in which consultation it was determined, that it ought to be the purple cloth robe, faced with black velvet, and not his scarlet gown, his black silk one, nor the common bar gown."

(a) As to the customs of London generally.—In 1 Rolle's Rep. p. 106, it is said: "If judgment be given in London, and it comes into B. R., we ought to take notice of the custom of London without being

alleged." And in *Appleton v. Stoughton*, Cro. Car. 516, the defendant pleaded a custom of London, relating to the trade of a point maker, upon which the plaintiff took issue, and a writ was awarded to the Mayor and Aldermen to certify by the mouth of their Recorder, (*ore tenus*), whether there was such a custom, and the recorder certified that there was not. And after this certificate it was moved, that this was a mistrial. But, after long deliberation, it was resolved by the Court, that the trial was good. The manner of obtaining such a certificate of a custom of London is set forth in the case of *Plummer v. Bentham*, 1 Burr. 248.

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June 12th.

The statute 8 Ann. c. 9, s. 39, making void indentures of apprenticeship, in which the full sum and sums of money received, given, paid, secured, or contracted for, are not truly inserted, does not apply to cases where the sum actually paid is inserted in the indenture, though it is a less sum than that which was originally agreed for, and the reduction was made to diminish the amount of stamp-duty.

KING v. LOW.

COVENANT, on an indenture of apprenticeship, for not instructing, &c., by the apprentice against the master. Pleas—*Non est factum*, and several special pleas: upon which the issues in substance were, *First*, whether the apprentice voluntarily absented himself, and became bound to another person;—*Secondly*, whether he was dismissed because he was incapable from ill health of attending to the business;—and *thirdly*, whether, supposing he had absented himself, he had afterwards tendered himself to serve, and was refused.

From the evidence, it appeared, that the plaintiff, whose father was a waterman, was bound apprentice to the defendant in April, 1826, to learn the business of a book-binder, and continued with him till October, 1827, when the business was parted with to a Mr. Williams; the apprentices, three in number, of whom the plaintiff was the youngest, continuing in it. The plaintiff had been employed chiefly in out-door work before Mr. Williams took the business; and on being put to the in-door work, which was heavy, he became ill, and went home ill twice between the 1st of October, 1827, and the beginning of May, 1828. It appeared that the work began about seven in the morning, and that the plaintiff used to become fatigued and unable to proceed with his business about four in the afternoon. Mr. Williams sent him to his father one Sunday morning, he having then been ill for several days and done no work, and sent a note with him, stating, that his business would not permit him to continue to keep him. In consequence of this, the father called upon Mr. Williams, who, in conversation, told him that he had only business enough for two apprentices, and also, that the plaintiff's state of health was such as to render him unfit for the business of a book-binder. On the 12th of June, 1828, the plaintiff was bound to a waterman, who was a proprietor of one of the Gravesend sailing boats. The father obtained the

indenture from Mr. Williams, saying, that it was the only evidence of his having paid the premium. He afterwards went to the defendant's son, who managed the defendant's affairs, and he told him that he had settled his father's debts by paying 7*s.* in the pound. The plaintiff's father said he thought he was entitled to the same. The defendant's son said he could not see that, but gave no reason. The plaintiff's father then made inquiries as to the truth of the statement, and found that it was correct. It appeared further, that 20*l.* was the premium *agreed for*, but that 19*l.* 19*s.* only was paid, and the stamp on the indenture was for the sum paid.

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Scarlett, A. G., for the defendant, first submitted, that the indenture was void under the statute 8 Ann. c. 9, s. 39, which enacts, that all indentures of apprenticeship, &c. "wherein shall not be truly inserted and written the full sum and sums of money received, *or in anywise, directly or indirectly*, given, paid, secured, *or contracted for*, with or relating to" any apprentice, &c., "shall be void, and not available in any Court or place, or to any purpose whatsoever, any charter, law, or custom to the contrary notwithstanding."

Lord TENTERDEN, C. J., was of opinion, that, as the sum mentioned in the indenture was the sum actually paid, it was sufficient (a).

Scarlett, A. G., then addressed the Jury, and contended,—*First*, that the plaintiff was not entitled to a verdict, as there was no proof of any tender of his services;—and *Secondly*, that, if he was entitled to a verdict, yet it was a case for nominal damages only, as the business of a waterman was better suited to his health than that of a bookbinder; and it would be unfair to give back, in the shape of damages, any portion of the premium, as the plaintiff

(a) This accords with the opinion of Lord *Ellenborough*, in the case of *Shepherd v. Hall*, 3 Camp. 180.

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had been supported for two years; and the principle upon which premiums are given, is, that the master may have some recompence for the early part of the time during which the apprentice is of little use in the business.

Hutchinson, for the plaintiff, in reply, contended, that there was a sufficient tender of service, and that the state of health was produced by the sudden change from the out-door work to the confinement of the in-door business. He also submitted, that the plaintiff was entitled to damages, inasmuch as the business of a book-binder was more profitable than that of a waterman.

LORD TENTERDEN, C. J. (in summing up), said:—The only question of fact is, whether there was a sufficient offer on the part of the plaintiff to return to the service. It is quite clear that there was no voluntary absenting. The letter of Mr. Williams, written at the time when there was no controversy, seems to me better evidence than the parol testimony of what occurred afterwards. But the statements of Williams altogether differ very little from his evidence, for he says, that he had not employment for more than two apprentices, although he mentioned, in addition, the state of the plaintiff's health. The state of health would naturally be a reason for selecting the plaintiff as the one to be sent back under such circumstances. If you take a young lad who has been used to out-door work, and keep him in a confined room for several days together, it will have the effect of injuring his health. The plaintiff should have been accustomed by degrees to the in-door business. Then was there a sufficient offer to return? It was not necessary to make a tender to the defendant, because his affairs were managed by his son, and his business had been parted with to Williams. The question is, whether the plaintiff's father, when he made all the inquiries into the state of the defendant's affairs, did not intend to say that his son was willing to return. Then, as to the damages,

you find that for some time past the plaintiff has been in an employment better suited to his health. But the father says it is a worse business. You will give such moderate damages as you think right, under the circumstances.

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Verdict for the plaintiff.—Damages, 19*l.* 19*s.*,
being the amount of the premium.

Hutchinson and *Chitty*, for the plaintiff.

Scarlett, A. G., and *Payne*, for the defendant.

[Attornies—*T. Browne*, and *Payne & Leachman*.]

COURT OF COMMON PLEAS.

*Adjourned Sittings at Westminster, after Easter
Term, 1829.*

BEFORE LORD CHIEF JUSTICE TINDAL.

KEMBLE *v.* FARREN.

June 13th.

ASSUMPSIT for the breach of an agreement, dated the 6th of June, 1827, stated to be made between the plaintiff, Mr. Charles Kemble, *on behalf of himself and the other proprietors* of Covent Garden Theatre, of the one part, and the defendant of the other part. The principal question in the cause was, whether there had been a change in the management of the theatre so as to justify the defendant in withdrawing from it, under a particular clause in the agreement. The proprietors, in addition to the plaintiff, were Mr. Willett and Captain Forbes. It appeared that certain papers had been signed by the proprietors, giving particular powers to Mr. Fawcett, as stage manager.

Where it appeared on the record, that an agreement sued on was made by the plaintiff, on behalf of himself and the other proprietors of a theatre, evidence of the declarations of one of such other proprietors was held admissible on the part of the defendant.

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Campbell, for the defendant, on his cross-examination of Mr. Robertson, the treasurer of the theatre, who stated that he had seen such papers, asked, if Mr. Willett had not told him that the papers were delivered to Mr. Fawcett.

Wilde, Serjt., objected to evidence of any thing said by Willett, who was not the plaintiff in the cause.

Campbell.—It appears that Mr. Willett is a proprietor, and Mr. Kemble makes the agreement on behalf of himself and the other proprietors. This makes Mr. Willett a co-principal. The action is brought for his benefit, and he will be entitled to a portion of the damages. Even if Mr. Kemble were only agent, the evidence would be admissible, on the same principle as, in an action by a broker on a policy of insurance, the declarations of the principal are received.

TINDAL, C. J.—I think that, as it appears on the record that the agreement was made by the plaintiff on behalf of himself and the other proprietors, and it is proved that Mr. Willett is one of the proprietors, the better way will be to receive the evidence.

Verdict for the plaintiff.—Damages, 750*l.* (a).

Wilde, Serjt., and *Coleridge*, for the plaintiff.

Campbell, *Thomson*, and *Hill*, for the defendant.

[Attornies—*Lowdham & Co.*, and *Reynolds & Co.*]

(a) The plaintiff sought to recover the sum of 1,000*l.*, as liquidated damages, under a particular clause in the agreement; and *Wilde*, Serjt., on his behalf, referred to *Crisdee v. Bolton*, ante, p. 240, de-

cided by Lord *Wynford*, then L. C. J. *Best*. *Tindal*, C. J., acted in the same manner as *Best*, C. J., had done, leaving it to the Jury to find the actual damage, and reserving the construction of the

agreement to be decided on motion to the Court, if the verdict should be for a sum less than the 1,000*l*. And a rule *nisi* has since been obtained by *Wilde*, Serjt.

As to the other question in the

cause, with respect to a change in the management and control of the theatre, a bill of exceptions was tendered by the defendant's counsel, which is now pending.

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GOULD v. HULME.

June 13th.

LIBEL. The *first* count of the declaration stated, that the plaintiff, before, &c., was *lawfully possessed* of a certain messuage, with the appurtenances, called or known by the name of the *Camden Arms Tavern*, and of certain goods and chattels therein, and had then and there just before &c., *sold and disposed of his interest* of and in the same *to the defendant*, &c. That the said plaintiff, just before &c., was an insolvent debtor, in actual custody in prison, and had duly applied *by petition* to the Court established for the relief of insolvent debtors in *England* for his discharge from such custody; which petition, *subscribed by the said plaintiff as such prisoner*, had been *duly filed* in the said Court, &c., and a certain day appointed for the hearing thereof. It then averred, in substance, that one Henry Revell Reynolds, Esq. was chief commissioner of the said Court, and that the defendant, to prejudice him against the plaintiff, composed and published of and concerning the said sale of the said Tavern, a certain libel, in the form of a letter addressed to the said chief commissioner. There were other counts, and the defendant pleaded—Not guilty.

The office copy of an Insolvent's petition, attested by the officer of the Insolvent Debtors Court, is sufficient evidence to prove an allegation, that the petition *subscribed* by the Insolvent was duly filed.

A letter written by an opposing creditor, to the chief commissioner of such court, previous to the hearing of an insolvent's case, is not a privileged communication.

The libel, after making some observations on the mode in which the plaintiff had stated his debts, &c. in the schedule, proceeded as follows:—"The reason why he was not opposed by more of his creditors was, that they thought there was nothing, and they knew, Gould being such a bad principle fellow, he was up to all manner of tricks, and that they should lose their time and expense to no purpose; but I trust

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you can see through his hypocrisy, and will punish him accordingly. *He, Gould, obtained 500*l.* from me for good-will of the Camden Arms, and 440*l.* appraisement, making a sum of 940*l.*, last June, under the most fraudulent representations, for this house, that was not doing any business at all, and was worth nothing, for which he and four others now stand indicted for the conspiracy, and will be tried the Sittings after this Term. He has ruined my prospects in life, through his base and fraudulent representations. I trust you will excuse me in thus addressing you, and I beg to remain, &c."* There was a postscript, stating that he had been told that the plaintiff intended to offer his creditors 1*s.* 6*d.* or 2*s.* in the pound, and keep 400*l.* or 500*l.* to set himself up again in business.

To prove the allegation which stated the filing of the petition—

Wilde, Serjt. for the plaintiff, put in an office copy, appearing on the face of it to be attested by the officer of the Court, which he submitted was sufficient evidence under the act of Parliament (a).

Hutchinson, for the defendant, contended, that copies were only made evidence for particular purposes, of which the present was not one, and that, as the averment in the declaration was, that the petition was *subscribed* by the plaintiff, the original ought to be produced, that the fact of his having signed it might be shewn.

Wilde, Serjt.—The object of the Legislature, in making copies evidence, is, to diminish expense, and the office copy in this case is quite sufficient. The act requires that the petition should be signed, and without it the Court would not have jurisdiction. But it appears that there

(a) 1 Geo. 4, c. 119.

has been an order of adjudication, and it is to be presumed that the Court would not have proceeded to adjudicate, unless it possessed the proper authority to do so.

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TINDAL, C. J.—By one section of the act, the petition is directed to be subscribed by the prisoner, and filed in the Court (a), and by another section it is provided, that a copy certified by the officer, or his deputy, to be a true copy, shall at all times be admitted as legal evidence in all Courts whatever (b). I think we must presume that what is required by the act to be done has been regularly done, and that this petition was subscribed by the plaintiff.

Hutchinson afterwards contended, that the plaintiff must be nonsuited, because he had not given any proof of the material allegation, that he was possessed of the Camden Arms Tavern.

Wilde, Serjt., and *Curwood*, referred to the libel itself, as stating the fact, and submitted that it was not necessary to prove it by evidence *aliunde*.

TINDAL, C. J., was of opinion, that the words of the libel sufficiently admitted the fact, and that the case must therefore proceed.

Hutchinson, then addressed the Jury, and argued that, under the circumstances, the letter was a privileged communication. He referred to *Macdougall v. Claridge* (c), *Dunman v. Bigg* (d), and *Fairman v. Ives* (e), from which he contended it appeared, that, if a person had an idea that he was acting *bond fide* in advancing his own cause, having an *actual interest* in the subject-matter of the libel, he was not answerable in an action, although he might have been intemperate in the expressions he used.

(a) s. 4.

(b) s. 45.

(c) 1 Camp. 267.

(d) 1 Camp. 269, n.

(e) 1 D. & R. 252.

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TINDAL, C. J., in his summing up, *inter alia*, said, that, although statements made in regular proceedings at law, might be privileged if *bonâ fide*, notwithstanding they were untrue, yet, in his opinion, such an irregular and improper proceeding as this, of addressing the Judge, could not be considered as at all coming within the line of privileged communications. His Lordship left the case to the Jury, who found a

Verdict for the plaintiff.—Damages, 1s.

Wilde, Serjt., and *Curwood*, for the plaintiff.

Hutchinson, for the defendant.

[Attornies—*Goddard*, and *Wigly*.]

PROMOTIONS.

IN the Vacation after Easter Term, the Right Honourable Sir *William Draper Best*, Knt. Lord Chief Justice of the Court of Common Pleas, was created a peer, by the title of Baron *Wynford*, of Wynford Eagle, in the county of Dorset, and resigned his office of Lord Chief Justice, on Friday, the 6th of June.

Sir *Nicolas Conyngham Tindal*, Knt., his Majesty's Solicitor General, was appointed Lord Chief Justice of the Common Pleas, *vice* Lord *Wynford*, resigned.

Sir *James Scarlett*, Knt., one of his Majesty's counsel, was re-appointed Attorney-General, *vice* Sir *Charles Wetherell*, Knt., resigned; and *Edward Burtenshaw Sugden*, Esq., one of his Majesty's counsel, was appointed Solicitor-General, *vice* Sir *Nicolas Conyngham Tindal*, Knt.

OLD BAILEY SESSION, 1829.

BEFORE MR. BARON HULLOCK, MR. JUSTICE LITLEDALE,
AND MR. SERJEANT ARABIN.

REX v. EDWIN MARTIN VAN BUTCHELL.

June 17th.

MANSLAUGHTER. The indictment charged the death to be by the thrusting of a "round piece of ivory into and up the fundament and against the rectum" of the deceased, William Archer, thereby making "one perforation, laceration, and wound, of the length &c., in and through the said rectum of the said William Archer."

If a person *bond fide* and honestly exercising his best skill to cure a patient, perform an operation which causes the patient's death, he is not guilty of manslaughter, and it makes no difference whether such person be a regular surgeon or not, nor whether he has had a regular medical education or not.

To render a declaration of a deceased person admissible on the trial of an indictment for manslaughter, it must have been made by

Adolphus, for the prosecution, stated that the deceased had laboured under a disease of the rectum, respecting which he went to Mr. Van Butchell, on the 10th May, 1829; when Mr. Van Butchell passed an instrument (a) into his body, giving him some pain; and that on the deceased returning home he took to his bed, from which he never rose, having died on the 17th of May. He then read an extract from Blackstone's Commentaries (b), and an extract from Hale's P. C. (c), and was proceeding to state

him under an impression of almost immediate dissolution, and it is not enough that the deceased should have thought that he should ultimately never recover.

Before a declaration of a deceased person is received as a declaration *in articulo mortis*, the Judge will hear all that the deceased said respecting the danger in which he considered himself to be, and it will, upon this, be for his Lordship to decide whether the deceased then had that impression on his mind which would render his declaration admissible.

(a) A rectum bougie.

(b) Black. Comm. Book 4, c. 14—"If a physician or surgeon gives his patient a potion or plaister to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure, and he shall not be punished criminally, however liable he might formerly have

been to a civil action for neglect or ignorance; but it hath been holden that, if it be not a *regular* physician or surgeon, who administers the medicine, or performs the operation, it is manslaughter, at the least; yet Sir *Matthew Hale* very justly questions the law of this determination."

(c) 1 H. P. C. 429. If a phy-

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that Lord *Coke* had said, that, if one who is not a regular surgeon, take upon him to cure a man, and the patient die, this is felony (a).

HULLOCK, B.—It is so said, in Lord *Coke's Institutes*, undoubtedly, but there has never been any decision of the kind.

Adolphus.—The gentleman now standing at the bar is, as I happen to know, the son of a person of great experience, and he has himself had much practice, for a great many years, which I think you should take as raising a presumption that he has had a regular education; indeed, I have been told that Mr. Van Butchell is a regularly educated surgeon. Whether he is a member of the College of Surgeons, I know not; and I believe you will be told by the Court that that is not essential; and I think you will also be told, that we must not scrutinize too nicely as

sician gives a person a potion without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and, contrary to the expectation of the physician, it kills him, this is no homicide; and the like of a chirurgion. 3 E. 3, Coron. 163. And I hold their opinion to be erroneous that think; if he be no licensed chirurgion or physician that occasioneth this mischance, that then it is felony, for physic and salves were before licensed physicians and chirurgions, and therefore if they be not licensed, according to the statute of the 3 H. 8, c. 11, or 14 H. 8, c. 5, they are subject to the penalties in the statutes; but God forbid that any mischance of this kind should make any person not licensed guilty of murder or manslaughter.

(a) 4 Inst. 251. Lord *Coke* there says, "If one that is of the

mystery of a physician take a man in cure, and giveth him such physic as within three days he die thereof, without any felonious intent, and against his will, it is no homicide; but Britton saith, that if one that is not of the mystery of a physician or chirurgion take upon him the cure of a man, and he dieth of the potion or medicine, this is, (saith he), covert felony." The passage in Britton, is in cap. 5, and it is in the following words: "Et pur ceo que ceste felonie [homicide] purra estre faite per colour de jugement per faux physiciens and per marveys surri-giens et per poyson et in moultz des manieres. Volons nous que trestons ceux soient endites per qui tielz covertes felonies ont este faites et ceux ausi qui fausement pur lower ou en autre manere ont ascun home dampne ou fait dampner a la mort per faux sermentz."

to how the operation was performed, if it was not performed with such gross ignorance as to shew a wanton carelessness of human life.

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On the part of the prosecution, it was proposed to give in evidence a declaration of the deceased, *in articulo mortis*. To prove this, Mr. Lloyd, a surgeon, was called, and he stated that he saw the deceased on the evening of the 10th of May, and that the deceased appeared to think that he should never recover.

HULLOCK, B.—I must hear all that the deceased said; and I must judge from what he said, whether he had that impression on his mind, which will make his declarations admissible in evidence.

Mr. Lloyd.—The deceased said, ‘I feel that I have had such an injury in the bowel, that I think that I shall never recover.’ On his saying this, I endeavoured to encourage him, as his symptoms were not then such as to lead me to consider him in danger of dying; but his expression was, that he felt satisfied that he should never recover.

HULLOCK, B.—The principle on which declarations *in articulo mortis* are admitted in evidence, is, that they are made under an impression of almost immediate dissolution (a). A man may receive an injury from which he may think that he shall ultimately “never recover,” but still that would not be sufficient to dispense with an oath. I must reject the evidence.

It was then proved by Mr. Lloyd, that he opened the body of the deceased, and that he found a portion of the ileum adherent to the rectum, and that on separating this adhesion, he discovered a small hole perforated through the rectum. Mr. Lloyd was cross-examined, with a view of shewing that these appearances might have been the result of natural causes; and he stated, that operations

(a) See the case of *Rex v. Pike*, *ante*, p. 598, and the authorities there referred to.

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would sometimes fail, notwithstanding that they might be most skilfully performed; and he added that he himself had operated in extracting an encysted tumour from the breast of a woman, at a time when she was pregnant, and who soon afterwards died; and that he and many other surgeons thought that correct practice, though he admitted that the propriety of the operation was doubted by others.

HULLOCK, B., inquired of *Adolphus*, if he thought he could carry the case farther.

Adolphus replied, that he did not think he could.

HULLOCK, B.—I am free to confess that this does not even approach to a case of manslaughter. It would be dreadful, if, every time an operation was performed, an individual was liable to have his practice questioned.

Brodrick, for the defence.—I am prepared to shew that Mr. Van Butchell has had a regular medical education.

HULLOCK, B.—I do not think that that is at all material to the case.

Brodrick.—I can call a great number of patients whose cases have been most successfully treated by Mr. Van Butchell.

HULLOCK, B. (in summing up).—This is an indictment for manslaughter, and I am really afraid to let the case go on, lest an idea should be entertained that a man's practice may be questioned whenever an operation fails. In this case there is no evidence of the mode in which this operation was performed; and, even assuming for the moment that it caused the death of the deceased, I am not aware of any law which says that this party can be found guilty of manslaughter. It is my opinion, that it makes no difference whether the party be a regular or an irregular

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surgeon, indeed, in remote parts of the country, many persons would be left to die if irregular surgeons were not allowed to practise. There is no doubt that there may be cases where both regular and irregular surgeons might be liable to an indictment, as there might be cases where, from the manner of the operation, even malice might be inferred. All that the law books have said has been read to you, but they do not state any decisions, and their silence in that respect goes to shew what the uniform opinion of lawyers has been upon this subject. As to what is said by Lord *Coke*, he merely details an authority, a very old one, without expressing either approbation or disapprobation (a); however, we find that Lord *Hale* has laid down what is the law on this subject. That is copied by Mr. Justice *Blackstone*, and no book in the law goes

(a) All that is stated by Lord *Coke*, on this point, is set forth, *ante*, p. 630, n. (a). However, in the same page of the 4th Inst. Lord *Coke* says, "Of the College of Physicians, and of their jurisdiction and authority, sufficient hath been said in the 8th book of Reports, in Dr. *Bonham's* case, whereunto we refer the studious reader. Hereunto we will add for the safety of physicians, especially of the King's physicians, a record, worthy of observation, Rot Pat. 32 Hen. 6, m. 17.—'By what warrant physic is to be given to the King.' Rex adversa valetudine laborans de assensu concilii sui assignavit Johannem Arundel, Johannem Saceby, et W. Hatcliffe, medicos; Robertum Warren, et Johannem Marshall, chirurgos; ad libere ministrandum et exequendum in et circa personam suam; imprimis, viz. quod licite valeant moderare sibi diastam suam et quod possint ministrare potiones, syrupos, confectiones, laxativas

medicinas, clysteria, suppositoria, caput purgea, gargarismata lealnen, epithimota, fomentationes, embrocationes, capitis rasuram, unctiones, emplastra, cerera ventos. cum scarificatione vel sine, emorodorum provocationes, &c. Dantes singulis in mandatis quod in executione premissorum sint intendentes &c." Upon this Lord *Coke* says, "Four things are to be observed, *First*, that no physic ought to be given to the King, without good warrant. *Second*, that this warrant ought to be made by the advice of his council. *Third*, they ought to minister no other physic than that which is set down in writing. *Fourth*, that they may use the aid of those surgeons named in the warrant, but of no apothecary; but to prepare and do all things themselves. And the reason of all this is the precious regard had of the health and safety of the King, which is the head of the commonwealth."

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any further. It may be that a person not legally qualified to practise as a surgeon may be liable to penalties (a); but surely he cannot be liable to an indictment for felony. It is quite clear, you may recover damages against a medical man for a want of skill; but, as my Lord *Hale* says, "God forbid that any mischance of this kind should make a person guilty of murder or manslaughter." Such is the opinion of one of the greatest Judges that ever adorned the bench of this country; and his proposition amounts to this, that if a person, *bond fide* and honestly exercising his best skill to cure a patient, performs an operation which causes the patient's death, he is not guilty of manslaughter. In the present case, no evidence has been given respecting the operation itself. It might have been performed with the most proper instrument and in the most proper manner, and yet might have failed. Mr. Lloyd has himself told us that he performed an operation, the propriety of which seems to have been a sort of *texata quæstia* among the medical profession; but still it would be most dangerous for it to get abroad, that, if an operation performed either by a licensed or an unlicensed surgeon should fail, that surgeon would be liable to be prosecuted for manslaughter. I think that, in point of law, this prosecution cannot be sustained; and I feel bound to say, that no imputation whatever ought to be cast upon the gentleman who is now at the bar, in consequence of any thing that has occurred.

Verdict—Not guilty.

Adolphus, for the prosecution.

Brodrick and *Carrington*, for the defence.

[Attornies—*Harper*, and *Flower*.]

(a) The statutes by which these penalties are imposed, which are all of the reign of King Henry the eighth, are collected in Com. Dig. tit. Physician, (D), and one of

them (the stat. 34 Hen. 8, c. 8) has a preamble prefixed to it, which is any thing but complimentary to the medical profession.

REX v. JOHN WILLIAMSON, O. B. 1807, cor. Lord ELLENBOROUGH.

THE prisoner was indicted for the murder of Ann Delacroix, at the parish of St. James, Westminster; he was also charged with manslaughter by the coroner's inquisition.

The prisoner was about seventy-five years of age. He was not a regularly educated accoucheur, but was a person who had been in the habit of acting as a man-midwife among the lower classes of people.

From the evidence of Elizabeth Garret, the nurse who waited on Mrs. Delacroix, it appeared that Mrs. D. had been delivered by the prisoner of a male child, on Friday, the 17th day of September, and that, on the Sunday following, an unusual appearance took place, which the medical witnesses stated to be a *prolapsus uteri*. This the prisoner mistook for a remaining part of the *placenta*, which had not been brought away at the time of the delivery; he attempted to bring away the *prolapsed uterus* by force, and in so doing he lacerated the *uterus*, and tore asunder the *mesenteric* artery. This caused the death of the patient, and it appeared from the testimony of a number of medical witnesses that there must have been great want of anatomical knowledge in the prisoner.

The prisoner, in his defence, said, that he had acted according to the best of his judgment.

Fourteen women were called as witnesses for the defence, all of whom had been delivered by the prisoner at different times; but six only were examined, and they spoke to the kindness and attention that the prisoner had displayed, and also to his skill, so far as they were able to judge.

LORD ELLENBOROUGH, C. J. (in summing up).—There has not been a particle of evidence adduced which goes to convict the prisoner of the crime of murder; but still it is for you to consider whether the evidence goes so far as to make out a case of manslaughter. To substantiate that charge, the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct, which is essential to make out a case of manslaughter. It does not appear that in this case there was any want of attention on his part; and, from the evidence of the witnesses on his behalf, it appears that he had delivered many women at different times, and from this he must have had some degree of skill. It would seem, that, having placed himself in a dangerous situation, he became shocked and confounded. I think that he could not possibly have committed such mistakes in the exercise of his un-

A person in the habit of acting as a man-midwife tore away part of the *prolapsed uterus* of one of his patients, supposing it to be a part of the *placenta*, by means of which the patient died:—Held, that this person was not indictable for manslaughter, unless he was guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention.

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clouded faculties; and I own, that it appears to me, that if you find the prisoner guilty of manslaughter, it will tend to encompass a most important and anxious profession with such dangers as would deter reflecting men from entering into it.

Verdict—Not guilty (a).

(a) The report of this case was revised by one of the learned counsel engaged in it.

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ABORTION.

On an indictment for administering a drug to a woman to procure abortion, she *not being quick with child*, if it appear that the woman was not with child at all, the prisoner must be acquitted, although it appear that the prisoner thought that she was with child, and gave her the drug with an intent to destroy such child. *Rex v. Scudder*,

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ACCEPTANCE.

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A verbal agreement was made for the purchase of some turnips growing in a field. After the purchaser had removed the principal part, the seller said to him, "You owe me *3l.*;" to which he replied, "I will send it before I draw any more turnips." He afterwards drew all the turnips, but did not send the *3l.*: *Held*, that it was recoverable on the account stated. *Pinchon v. Chilcott*, 236

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ADMISSION.

1. An admission made by a party before an arbitrator, may be used as evidence on the trial of another cause, and is not to be considered as an admission made with a view to a compromise. *Doe dem. Lloyd v. Evans*, 219

2. The mere circumstance of a witness being too ill to attend the trial, is no sufficient ground for reading his deposition taken in Chancery. *Ibid.*

AGENT.

1. An agent authorized to sell goods has (in the absence of advice to the contrary) an implied authority to receive the proceeds of such sale. *Capel v. Thornton*, 352

2. In an action against a body corporate, for negligently pulling down a house which belonged to them, whereby the plaintiff's house was injured—a letter written to the plaintiff respecting the pulling down of the house by the defendant's surveyor, who had the management of all their buildings, is to be presumed to have

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been written by him in that capacity, and is therefore evidence against them. *Peyton v. The Governors of St. Thomas's Hospital*, 363

3. If the attorney of a creditor write to *A.* asking payment of a debt due from *B.*, and *A.* answer the letter and pay 200*l.* of the debt; and afterwards the attorney again write to *A.*, asking payment of the residue of the debt, and *A.* send a letter promising payment, this last letter is evidence in an action against *B.* *Roberts v. Gresley*, 380

4. If a person, on being applied to on a particular subject, writes in answer, mentioning another person, and saying on one occasion, "He is in possession of my sentiments," and on another, "I have written to him, and I refer you to him thereon:" such letters are sufficient to constitute the party referred to agent in the business; and what he said at a meeting on the subject may be given in evidence against the principal. *Hood, assignee of Green, v. Reeve*, 532

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DECLARATION, 1.—STAMP, 2, 3, 4.

1. A *net* rent is a sum to be paid to the landlord clear of all deductions; and if one agree to take a lease at a *net* rent, he cannot object that the lease contains a covenant for him to pay the land and sewers taxes.

What are *usual covenants* is a question of fact for the Jury, and not a question of construction for the Court. *Bennet v. Womack*, 96

2. A document by which *A.* agrees to grant, and *B.* to take a lease of certain premises for a certain term, at a certain yearly rent, is to be considered merely as an agreement, not requiring a lease stamp, although no lease be prepared, and *B.* occupies during the whole of the term under such document, and pays the rent specified in it.

An administrator *cum testamento annexo* cannot declare before administration is granted. *Phillips v. Hartley*, 121

3. Where a party occupies under an agreement for a lease during the whole of the term for which the lease was to be granted, a notice to quit is not necessary at the end of such term, as the agreement is evidence of the *expiration* of the tenancy, as well as of the other terms of the holding. *Doc dem. Tilt v. Stratton*, 164

4. *A.* agreed with *B.* by *parol*, that, if *B.* would take of him a lease for twenty-one years, of certain premises, he would give 20*l.* towards putting them into repair. *B.* accepted the lease, and *A.* refused to pay the money:—*Held*, in an action for it, that an admission by *A.* that the money was due, entitled *B.* to recover upon the account stated. *Seagoe v. Dean*, 170

5. If the party employed by the consignee of a ship's cargo to sell it, undertake that he will "pay freight and primage, and *demurrage, if any be due*," and in every respect put himself in the place of the charterer, he will be liable to pay damages for any delay in discharging the cargo beyond the number of days allowed for *demurrage* in the charter-party. *Benson v. Hippius*, 186

6. An agreement contained by itself less than 1080 words, but there was in it a stipulation, that a clause in a previous agreement, which was duly stamped, should be taken as part of the new agreement:—*Held*, that, although with the clause referred to, there would be more than 1080 words, a 1*l.* stamp was proper, as that clause ought not to be reckoned. *Attwood v. Small*, 208

7. An agreement by which *A. B.* agrees "to remain with" *C. D.* for two years from the date of it, "for the purpose of learning" a particular business, will not support a declara-

tion stating the consideration to be, that *C. D.* would "*receive*" *A. B.* into his service."—*Semble*, also, that such an agreement is not available, on the grounds of there being no mutuality, and no consideration appearing on the face of it. *Lees v. Whitcomb*, 289

8. An instrument by which *A.* agrees to let, and *B.* to take, certain premises, on the terms that *A.* shall pay certain specified rents, varying in amount, at the end of every three years, up to a specified date, and which provides, that, from and after that date, "*he shall pay the clear annual rent of 9l. till the end of the lease,*" but does not mention any time at which the lease is to terminate, is good only for the time previous to the date at which the 9l. is to commence. *Gwynne v. Mainstone*, 302

9. If one undertake to furnish a new history of a country, this is not performed by his furnishing a book which is a translation of an entire previously existing history, with his own continuations and some additions. *Paton v. Duncan*, 336

10. If *A.* agrees to make an article of certain materials for a stipulated price, but puts in materials of a better kind, he is not at liberty on that account to charge more than the stipulated price, nor can he require the article to be returned, because the buyer will not pay an increased price on account of the better materials. *Wilmot v. Smith*, 453

ALEHOUSE.

1. A brewer who supplies beer to a public house, cannot charge any person as a primary debtor but the person licensed to keep the house: and if beer be so supplied on the credit of a person not licensed, the brewer cannot recover against such person, on the ground that it is a fraud on the Excise. *Meux & Others v. Humphries*, 79

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2. A publican cannot recover for beer furnished to third persons by the order of an individual who has previously become intoxicated by drinking in his house. *Brandon v. Old*, 440

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The custom of London, which allows a man to build to any height upon ancient foundations, although he may darken his neighbour's lights thereby, must be confined to cases where all the four walls of the building belong to the party, and will not justify him in raising an obstruction by means of three walls of his, so as to darken the lights in a fourth wall belonging to his neighbour. *Sir L. Shadwell v. Hutchinson*, 615

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ANNUITY.

If, in an action of covenant for arrears of an annuity, the defendant plead a release, lost by time and accident, and, to induce the Jury to presume a release, shew that the annuity was not paid for seventeen years, and that the plaintiff borrowed money of the grantor of the annuity, and regularly paid him interest, without setting off the annuity—the Jury ought not to find for the defendant, unless they are satisfied that there is fair ground for supposing, that, at some particular

period during the seventeen years, the plaintiff *actually* executed a release of the annuity; and, to rebut the presumption of such a release, the Jury may look at the situation of the parties, and take into their consideration the circumstances of the plaintiff being a near relative of the grantor of the annuity having large expectations from him, and of the grantor being a very old man, peremptory with his relatives, and very attentive to his pecuniary concerns. *Bigg v. Roberts* and another, *Executors of Rundell*, 43

APOTHECARY.

See SURGEON.

1. If, in an action for an apothecary's bill, it appear that the plaintiff, on and prior to the 1st of August, 1815, was a curer of certain local complaints, but did not keep any shop or make up the prescriptions of physicians, he will not be entitled to recover the amount of his bill. *Thompson v. Lewis*, 483

2. An apothecary may either charge for attendance, or for the medicine he sends, but not for both. *Towne v. Lady Gresley*, 581

APPREHENSION.

See LARCENY, 1.

APPRENTICE.

1. If a lad goes on liking with a view to his being bound an apprentice, his intended master cannot charge for his board and lodging for the first month, nor perhaps for so long time as he conducts himself properly. But if he stays for many months, behaving ill, after complaints to his father of his misconduct; it will be for the Jury to say whether there was any contract, either express or implied, that his father should pay for his board and lodging. *Earratt v. Burghart*, 381

2. The staying out by an apprentice on a Sunday evening, beyond the time allowed him, is not such an un-

lawful absenting of himself as will enable his master to maintain an action of covenant against a person who became bound for the due performance of the indenture. *Wright v. Gihon*, 583

3. If an apprentice absent himself from his master's service, and the master take him back, and an action of covenant be brought for his thus absenting himself, this condonation must be pleaded specially. *Ibid.*

4. The stat. 8 Ann. c. 9, s. 39, making void indentures of apprenticeship, in which the full sum and sums of money received, given, paid, secured, or contracted for, are not truly inserted, does not apply to cases where the sum actually paid is inserted in the indenture, though it is a less sum than that which was originally agreed for, and the reduction was made to diminish the amount of stamp-duty. *King v. Low*, 620

ARBITRATION.

See PERJURY, 1.

1. A dispute between A. B., a married woman, and C. D., was referred to arbitration. After the reference had proceeded for some time, an additional matter was submitted by the attornies for the parties. C. D.'s attorney signed the submission in his presence. A. B.'s attornies signed in the presence of C. D.'s attorney, but without any authority from their client. The award was afterwards set aside; and C. D.'s attorney sued him for the expenses of the arbitration:—*Held*, that he had not been guilty of such negligence in not requiring to see the authority of A. B.'s attorney, as could prevent his recovering the amount of his bill. *Edwards, Gent., One &c. v. Cooper*, 277

ARREST.

See ATTORNEY, 2.—LARCENY, 1.—MURDER, 1, 2.

1. A sheriff's officer having a war-

rant from the sheriff to arrest a party for debt, went to the party and read his warrant to him, and then, having taken a fee, proceeded to the party's attorney, to let him know it, for bail to be put in. After this, the officer returned that he had taken the party: *Semble*, that this is no arrest. *George v. Radford*, 464

ASSAULT.

See SEARCH-WARRANT, 1.

1. A person who has preferred an indictment for an assault, from which he did not suffer any personal injury, and has succeeded in it, and received from the Treasury a portion of the fine imposed upon the defendant, is not entitled, in an action against the same defendant, to recover more than nominal damages. And it is the duty of an attorney when applied to to bring such an action, to dissuade the party from persevering in his intention. *Jacks v. Bell*, 316

2. Riding after a person and obliging him to run away into a garden to avoid being beaten, is an assault. *Martin v. Shoppee*, 373

ASSUMPSIT.

See ALIHOUSE, 1.—BANKRUPT, 1.—CONVEYANCER, 1.

1. If a party say to his creditor that he will pay him so much, and put his hand in his pocket to take out the money, but, before he can get his money out, the creditor leaves the room, and the money is in consequence not produced till he is gone—this is no tender. A plea of tender is in practice very seldom successful, and the Lord Chief Justice observed, that he was on that account always sorry to see such a plea on the record. *Leatherdale v. Sweepstone*, 342

2. In an action for money had and received, the defendant, as an answer to the action, put in one part of a deed of covenant, executed by the plaintiffs, whereby the defendant co-

venanted to pay over all monies received by him on account of the plaintiffs; notice having been given to the plaintiffs to produce the counterpart of this deed:—*Held*, that the defendant's having possession of the plaintiffs' part of the deed, was presumptive evidence that he had executed the counterpart, and that this was equally a ground of nonsuit whether the counterpart had been lost or not. *East India Company v. Lewis*, 358

ATTACHMENT.

Semble, that the attaching by process from the Sheriff's Court in London, of property in the hands of the garnishee, is not such a conversion as will enable the owner to maintain trover. *Mallalieu v. Laugher*, 551

ATTORNEY.

See ARBITRATION, 1.—ASSAULT, 1.—TENDER, 1.—WITNESS, 7.

1. The rule, that all papers relating to the cause must be taken to be put into the hands of the attorney, must be confined to the attornies of persons residing abroad, while the cause is going on in England, and does not apply to cases where the party is resident in England; and in no case does it extend to any but such papers as might be reasonably expected to be put into the hands of the attorney for the purposes of the cause. *Vice v. Dow. Visc. Anson*, 19

2. A. placed money in the hands of his attorney to invest for him, giving the attorney an unlimited discretion to do what was best; the attorney advanced the money to B. on mortgage, but, discovering that the security was bad, the attorney sued out a bailable writ in A.'s name against the borrower for the amount, without A.'s knowledge: *Held*, that B. could maintain no action against the attorney for arresting him without the authority of A., if the attorney acted

bona fide, and A. afterwards approved of what he had done. *Anderson v. Watson*, 214

3. If an attorney undertake to conduct a cause for the costs out of pocket, it being represented to him by his client, that such client took a certain interest under a deed—the attorney cannot charge more than the costs out of pocket, though it should turn out that the cause was lost because his client did not take the interest under the deed which he stated that he took, it being the duty of the attorney to see the deed before he brought the action.

If an attorney does business for a client of a nature to make his bill taxable, and other business clearly not so, he is bound to put the whole into one bill, which bill is taxable; and he cannot bring an action in the first instance, and recover for the non-taxable business, but must deliver his whole bill a month, &c. under the statute. *Thwaites v. Mackerson*, 341

4. Though it is not absolutely necessary, yet, in correct practice, an attorney ought, before he commences an action, to take a written direction from his client for so doing. *Owen v. Ord*, 349

AUCTION.

See VENDOR AND VENDEE, 1.

If an auctioneer signs a contract for the sale of a house in his own name, and receives the deposit (his principal being present), and, after the purchaser has left the room, pays over the deposit to such principal—the purchaser may, notwithstanding this, maintain an action against the auctioneer, to recover back his deposit, if a good title cannot be made. *Gray v. Gutteridge*, 40

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BANKRUPT.

BAIL BOND.

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BAIL.

1. Bail to the sheriff have no right to take their principal into custody, nor have bail in the Palace Court. With respect to bail above, it is otherwise. *Rex v. Hughes*, 373.

2. If, at a trial, it be discovered that a witness for the defence is one of the bail, and therefore incompetent, the Judge at the trial will, on the defendant's depositing a sufficient sum with the associate, make an order for striking the witness's name out of the bail-piece, so as to render him a competent witness. *Bailey v. Hole*, 560

The amount to be deposited must be the sum sworn to, and a further sum for costs. *Ibid.*

BANKRUPT.

See BILL OF EXCHANGE, 14.—
PLEADING, 6, 7.

1. Under the 81st sect. of the bankrupt act, 6 Geo. 4, c. 16, a *bona fide* payment made by a bankrupt more than two months before the issuing of the commission, the receiver having no notice of an act of bankruptcy, is protected, and the fact of his knowing the bankrupt to be in difficulties makes no difference. An admission by a party in his examination before Commissioners of bankrupt, that he has received a sum of money belonging to the bankrupt after an act of bankruptcy, is not evidence of an account stated with the assignees; and the most that an examination before the Commissioners does, is to make out a *prima facie* case for the assignees, that the party has so much of the bankrupt's money in his hands, so as to call on him for an explanation; but, if there be no count for money had and received to the use of the assignees, they must be nonsuited. Whether the act of bankruptcy, by

lying in prison 21 days relates to the first of the 21 days, or only to the last of them?—*Quere. Tucker and another, Assignees of Hickman v. Barrow, Gent., One, &c.* 85

2. *A.* being a trader, before any act of bankruptcy, directed his broker, who had authority to distrain for rents due to him, to pay a certain sum to *B.* in satisfaction of a debt, and the broker, *bond fide*, agreed with *B.* to pay him as soon as he received the rents, and after this *A.* became bankrupt:—*Held*, that the assignees of *A.* could not recover this sum from the broker, though he did not in fact pay it over to *B.* till after the commission issued. *Bedford and others, Assignees of Cohen, a bankrupt, v. Perkins*, 90

3. If a person who has numerous dealings with a bankrupt, on being examined before the Commissioners, does not bring his books with him, but, while under examination, consents that the accountant to the commission shall make extracts from them: these extracts cannot be used as evidence against him, without also reading his examination. If one buys goods of a bankrupt under such circumstances as will entitle his assignees to maintain trover for them, such buying is in itself a conversion, and the assignees need not adduce evidence of a demand and refusal. Upon the question, under the stat. 46 Geo. 3, c. 135, (repealed from the 1st Sept. 1825, by the stat. 6 Geo. 4, c. 16), whether a party dealing with a trader knew him to be insolvent: the Jury may infer such knowledge from the fact of the party buying goods of the trader to a great extent for a period of near two years, at prices more than thirty *per cent.* under prime cost. *Yates and another, Assignees of Marshall, a bankrupt, v. Carnesew*, 99

4. A carriage finished and paid for before the bankruptcy of the maker, but suffered to remain on his pre-

mises at the request of the owner, on account of his being abroad, cannot be taken by the assignees, as in the order or disposition of the bankrupt, although such bankrupt put it in his front shop, and actually sell it to another. In such case, an actual delivery of the carriage at the house of the person for whom it was made is not necessary to constitute him the owner.

Bartram v. Payne, 175

5. *Semble*, that, under the provision of the new bankrupt act, 6 Geo. 4, c. 16, s. 59, a bankrupt in custody, by insisting on his discharge, previous to proof of a debt, does not estop himself from disputing the validity of the commission against him. *Mott v. Mills*, 197

6. If a person, who is in fact assignee of a bankrupt, be sued in trover, and it appear that he claims the goods as property belonging to the bankrupt; in making out this defence, he need not give evidence of the trading, &c., unless there has been notice of disputing the commission, although he be not, in point of form, *sued as assignee*.

If an inn-keeper borrow a chaise from a coach-maker while he has a new chaise making, and use it in the course of his trade, but does not have his name painted upon it, under the stat. 4 Geo. 4, c. 62, s. 11, this is not such a reputed ownership of the borrowed chaise, as will entitle the assignees of the inn-keeper to detain it from the coach-maker. *Newport v. Hollings*, 223

7. A commission of bankrupt cannot be supported against a person under age. *O'Brien v. Currie*, 283

8. To prove an act of bankruptcy, in a trader who is a member of parliament, by his not paying or securing to a creditor a debt of 100*l.* after the suing out of a writ of summons, &c., it is not absolutely necessary to call the creditor. If a writ of *fi. fa.* be sued out against one of several part-

ners, for a debt due from him alone, there is great doubt as to what interest in the partnership property can be sold by the sheriff. *Burton v. Green*, 306

9. In an action by the assignee of a bankrupt, a plea was delivered to the plaintiff's attorney by a clerk of the defendant's attorney, who, through mistake, omitted to deliver with it a notice to dispute the bankruptcy. A few hours after, as soon as the omission was discovered, the plea was fetched away on the pretence that there was some error in it; and, in the course of the same day, a fresh plea was delivered, accompanied by a notice:—It was held, at *Nisi Prius*, that, although the term for pleading had not expired, the notice was not sufficient under the 90th section of the 6 Geo. 4, c. 16; but the Court of Common Pleas, under the circumstances, granted a new trial, on payment by the defendant's attorney of the costs, as between attorney and client. *Lawrence*, assignee of *Tolson*, *v. Crowder*, 229

10. The correctness of the bond given to the Lord Chancellor under the 13th section of the Bankrupt Act, cannot be disputed at *Nisi Prius*, in an action to try the validity of the commission, in the case in which it was given. Nor can it be considered there, whether the defendant's attorney has agreed to accept a notice to dispute, which had been delivered after the time mentioned in the act of Parliament. *Folks v. Scudder*, 232

11. If assignees of a bankrupt, suing for a debt due before the bankruptcy, receive notice of disputing the trading, &c. the Judge will only grant them a certificate for the costs of producing the depositions, and not for the costs of the attorney's attendance, or of witnesses to prove the bankruptcy. *Ralpho v. Daves*, 362

12. The making of bricks for sale, from clay taken from a man's own

land, does not constitute him a trader, within the meaning of the bankrupt laws; nor will it be a trading, if such person buy chalk for the purpose of burning with the clay, to improve the bricks, and afterwards sell a portion of the chalk, when converted into lime. *Paul v. Dowling*, 500

13. In trespass for taking goods, the defendant pleaded (without the general issue) a justification under the warrant of commissioners of bankrupt, and averred, that the plaintiff "had become bankrupt within the true intent and meaning of the stat. 6 Geo. 4, c. 16." Replication, denying that the plaintiff became bankrupt:—*Held*, that on these pleadings the defendant had the right to begin.

If a plea contain distinct allegations of a trading and petitioning creditor's debt, and then go on to state, that the plaintiff "became bankrupt," and in the replication the plaintiff protest the trading and petitioning creditor's debt, and deny that the plaintiff "became bankrupt," this merely puts in issue the act of bankruptcy, and the words "became bankrupt," coupled with the other two allegations, will be held to extend to the act of bankruptcy only. *Cotton v. James*, 505

BENEFIT SOCIETIES.

On an indictment against the stewards, &c., of a benefit society, for disobeying an order of two justices, commanding them to re-admit A. B. to be a member of that society, it is no defence, that A. B. was a person, who, by the rules of the society, was ineligible to be a member of it, as that was matter of defence before the justices; and if it be proved that the order was served on one of the defendants, and that the others, when A. B. applied to be re-admitted, said, that they would not admit him, and did not care for the justices' order; that is presumptive evidence of a ser-

vice of the order upon them. *Rex v. Gilkes and others*, 52

BILL OF EXCHANGE.

See EVIDENCE, 3.—PROMISSORY NOTE.

1. In an action on a bill of exchange, if a person called to prove the consideration say that the bill was accepted for value received, but refuse to say of what that value consisted, on the ground that it might render him liable to a *qui tam* action, he cannot be compelled to answer; but, if he persist in refusing, it will stand upon the evidence that there was no consideration. *Dandridge v. Corden*, 11

2. If a declaration on a bill of exchange—indorsee against acceptor—state that it was indorsed to the plaintiffs, as the surviving assignees of A. B. after his bankruptcy—the plaintiffs must prove that the bill was indorsed to them after the bankruptcy, and in their capacity of surviving assignees. *Bernasconi and others, Assignees of Chambers and others, v. The Duke of Argyle*, 29

3. In an action on a note, if it appear on the inspection of the note, that it has been altered, it lies on the plaintiff to shew that the alteration took place under such circumstances as will entitle him to recover.

Whether a conversation between the defendant and one of the witnesses is sufficient to entitle the plaintiff to recover on the account stated, is a question for the Court, and not for the Jury. *Bishop v. Chambre*, 55

4. If a bill drawn by a banker in the country on a banker in town, in favor of A., payable after sight, be indorsed by A. to the defendants, who indorse to the plaintiffs seven days after the date of the bill, and the plaintiff delay presenting it for acceptance for four days, it will be left to the Jury to say whether the plaintiffs have been guilty of *unreasonable*

delay; and in considering this, the Jury may infer, from the defendant himself having kept the bill so long unaccepted, that it is not the course of business to present such bills for acceptance immediately after the party receives them. *Shute and others v. Robins and others*, 80

5. A bill, which has been paid by the drawer, in default of payment by the acceptor, may afterwards be re-issued by the drawer, and the acceptor will be still liable to pay it.

In such case, if an action be brought against the acceptor by the indorsee of the drawer, the acceptor cannot inquire into the state of the accounts between the indorsee and drawer, nor will the state of such accounts furnish him with any defence. *Hubbard v. Jackson*, 134

6. If, in an action on a bill of exchange given for goods sold, it be proved that the bill was fetched away by the plaintiff's servant, from the house of a third person, after the commencement of the action, and only a short time before the trial, such evidence will not make it necessary for the plaintiff to prove that he, at the time of action brought, was the holder of the bill, and entitled to sue upon it. *Burdon v. Halton*, 174

7. In an action by the first indorsee against the acceptor of a bill of exchange, the declaration of the drawer made before indorsement, shewing that the acceptor received no value for his acceptance, cannot be admitted in evidence, if the drawer be living at the time of the trial; because in such case he might be called as a witness. *Hedger v. Horton*, 179

8. If several persons, not partners in business, separately indorse, for the accommodation of the drawer, a bill of exchange, which has been previously indorsed by another person, and, on the bill being dishonoured, pay the party who has discounted it, in equal proportions, they may strike out

their own indorsements, and bring a joint action against such previous indorser, to recover the amount of the bill. *Low v. Copestake*, 300

9. It is not necessary in an action against the drawer of a bill of exchange, payable *after date*, to aver acceptance or notice of refusal to accept, but proof of presentment for payment is sufficient. If a bill is accepted payable at a particular place, and the acceptor dies before it becomes due, it is sufficient, in an action against the drawer, to prove presentment at the specified place, and it is not necessary to shew presentment at the house of the deceased's representative. *Philpott v. Bryant*, 244

10. If a letter, giving notice of the dishonour of a bill, is put into the two-penny post-office, in time to be delivered on the proper day, in the ordinary course of business, but, from some delay in the office, does not reach its destination till afterwards, such delay in the office will not prejudice the party by whom the notice was given.

If there are several indorsers of a bill, and the last indorsee and holder resorts in the first instance to the first of such indorsers, he is not entitled to as many days as there are indorsers to give notice of dishonour in, but must give it within the same time as he would have been obliged to do it in, if he had resorted at first to his own immediate indorser. *Dobree v. Eastwood*, 250

11. A trader in London took a bill of exchange in part payment for goods, of a person representing himself to be a tradesman from the country, and to have been recommended by a customer, and sent the goods, in consequence of an order from the buyer, to a public-house, which was not a booking-office, without making any inquiries except as to the respectability of the acceptor. The bill turned out to have been stolen, and, in an action

by the trader against the acceptor, the defendant had a verdict, on the ground that the plaintiff had taken the bill out of the ordinary course of trade, and under circumstances which ought to have excited his suspicion. *Slater and others v. West*, 325

12. If a defendant has entered into a deed of composition with his creditors, containing the usual clause of release, and the plaintiff has executed the deed as a creditor for a certain sum, that is a good defence to an action by the plaintiff as indorsee of a bill to a larger amount, of which the defendant was indorser, and which then lay dishonoured, in the plaintiff's hands. But it is no defence as to two similar bills, also of larger amount, which the plaintiff had paid away, and which were then in the hands of third parties.

If, after a bill is dishonoured, the indorser offer to pay the holder so much in the pound, on the amount: *Semble*, that this dispenses with proof of the notice of dishonour. *Margetson v. Aitken*, 338

13. One having made and signed a promissory note, handed it to a third person, the payee being present; but before it was given to the payee it was altered, by the consent of all parties:—*Held*, that this giving it to the third person was not an issuing of it, and that it did not require a new stamp. *Sherrington v. Jermin*, 374

14. A bill given to a creditor to induce him to sign a bankrupt's certificate is void, in whosever hands it may be, and whatever the consideration given by the holder; but a bill given to a creditor to keep him from taking steps to oppose the certificate, would be good in the hands of a holder for value without notice. *Birch v. Jerris*, 379

BROKER.

BOND.

See BANKRUPT, 10.—PLEADING, 8.

1. In an action of debt, on a bond to secure the re-payment of money with interest, the plaintiff can only recover to the amount of the penalty, with 1s. for the detention of the debt. *Hellen v. Ardley*, 12

2. If in an action on a bond given by the sureties of a collector of taxes, there be breaches assigned, that the collector did not pay over money received, and that he did not duly demand and enforce payment of the taxes, it is not necessary, on the part of the plaintiff, to prove exactly what money he received; for if it be proved that he was to collect a certain sum, and that he paid over a smaller sum, and did not take proper steps to exonerate himself from the residue, the plaintiff will be entitled to recover. Omitting a word where the context supplies it, or inserting a wrong word, where the context corrects the mistake, is no variance. Therefore, if, on oyer of a bond, the obligees are described to be Commissioners acting under an act of Parliament for the regulation of the duties on assessed taxes, and in the bond the duties are stated to be duties of assessed taxes, this is no variance. *Loveland v. Knight*, 106

BROKER.

See LANDLORD AND TENANT, 1.

Whether, in an action against a broker by his principal for charging an increased price in addition to his commission, it is competent to the broker to shew that in some of the transactions he acted as a principal, it being contrary to the duty and oath of a broker so to act—*Quære*.

To prove the averment of actual payment by the principal of the over-charges, it is sufficient to shew a running unsettled account between the parties, by which it appears, that, as

COACH-PROPRIETORS. 647

far as the particular transactions in question are concerned, the principal has paid more than the amount of the over-charges, though, on the whole account, continuing to a period long subsequent, the balance is in favor of the broker to more than their amount also. *Proctor v. Brain*, 536

BULL-BAITING.

See CRUELTY TO CATTLE, 1.

BURGLARY.

1. On an indictment for burglary, by breaking into a house, in the night-time, and stealing to the value of 5*l*. or more, the prisoner may be convicted of burglary, or of house-breaking under the stat. 7 & 8 Geo. 4, c. 29, s. 12, or of stealing in a dwelling house to the value of 5*l*. *Rea v. Compton*, 418

CAUTION, WANT OF DUE.

See BILL, 11.

CHURCH.

See SACRILEGE.

COACH-PROPRIETORS, LIABILITY OF.

1. A parcel containing two hundred sovereigns, inclosed in six pounds of tea, was sent by coach, and paid for as of ordinary value, both the party sending and the owner of the parcel being aware of a notice by the coach proprietors, limiting their responsibility to 5*l*.; the parcel was stolen by one of the porters of the coach, while it was standing in the street at a manufacturing town in the course of its journey:—In an action to recover the value from the coach-proprietors, the defendants had a verdict, on the ground, that the loss was occasioned by the improper mode in which the parcel had been committed to their care. *Bradley v. Waterhouse and Briggs*, 318

COIN.

1. In an indictment for putting off counterfeit money at a lower rate than its denomination imported, it was alleged that the prisoner put off a counterfeit sovereign and three counterfeit shillings, "for the sum of five shillings." The proof was, that the prisoner said he would let the witness have a bad sovereign at 4*s.*, and three bad shillings at 1*s.*; and the witness paid for them with two good half-crowns:—*Held*, that this proof supported the allegation. *Rex v. Hedges*, 410

COLONIES.

Semble, that the governor of a British colony has the ecclesiastical power of an ordinary, without that authority being expressly named in his commission.

If a governor of a colony has the authority of the ordinary, he has no power to commit a churchwarden who refuses to account, he ought to proceed upon a citation, and must excommunicate. *Basham v. Lumley*, 489

COMPENSATION.

See CONDITIONS OF SALE, 1.

COMPETENCY.

See WITNESS, 1, 3, 8.

CONCUBINAGE.

See WITNESS, 7.

CONDITIONS OF SALE.

1. On a sale of a reversionary interest, with the usual condition, that no error of description, &c., should vitiate the sale, but a compensation be allowed, the reversion was described as absolute, on the death of a person aged sixty-six. In fact, the person was only sixty-four, and the reversion was not absolute, as the property would be divided if he left more chil-

CONVERSION.

dren than one:—*Held*, that this sale was void, and that the offer of a compensation would not support it: but if it had been a mere difference of the age, *semble*, that it would have been otherwise. *Sherwood v. Robins*, 339

CONFESSION.

If a prosecutor gives in evidence, a declaration made by a prisoner, it becomes evidence for the prisoner, as well as against him; but, like all other evidence, the Jury may give credit to one part of it, and not to another. *Rex v. Higgins*, 603

CONSTABLE.

See TROVER, 1.

CONTRIBUTION.

A. & *B.* were sureties for *C.*, a collector of taxes, who became a defaulter. The obligees sued *A.*, and recovered:—*Held*, that, in an action for contribution, brought by *A.* against *B.*, *A.* could only recover half the amount of the verdict against him, and that he could not recover from *B.* either the half of the taxed costs of the obligees, or the half of his own costs of defending the action brought by the obligees.

Held, also, that if *A.*, after the verdict in the action against him on the bond, obtain a sum of money from *C.*, he must take that in reduction of the amount of the verdict, and cannot apply it either to pay his own costs, or the taxed costs of the obligees. *Knight v. Hughes*, 467

CONVERSION.

If *A.* send goods to *B.* to pack, and *B.* does not forward them to *C.*, when so desired, but refuses to part with them, and tells *C.* that he will not give them up unless *C.* will guaranty a debt due to him:—This is evidence of a conversion by *B.* *Sharp v. Pratt*, 34

CROSS-EXAMINATION.

CONVEYANCER.

If a certificated conveyancer induce a creditor of a bankrupt to employ him in investigating a bankrupt's affairs, by representing himself to be an attorney and solicitor, he is not entitled to recover any thing for his trouble: and even if he paid fees to counsel in the course of the investigation, he cannot recover them of his employer as money paid, laid out, and expended. *Crammond v. Crouch*, 77

CORONER'S INQUISITION.

1. If the names of the Jurors be not set out in the caption of a coroner's inquisition, and the inquisition be not signed by the jurors, with their names at length—the inquisition is bad. *Rex v. Bowen*, 602

2. If some of the jurors sign with their marks, such marks ought to be verified by an attestation. *Ibid.*

COSTS.

See *BANKRUPT*, 11.

COSTS, BILL OF.

See *PROMISSORY NOTE*, 3.

COVENANT.

See *AGREEMENT*, 1.—*ANNUITY*, 1.

CROSS-EXAMINATION.

1. If the plaintiff's counsel call "Captain S.," and Captain *Hugh S.* answer, and is sworn, and the plaintiff's counsel, after asking him a few questions, ascertain that it was Captain *Francis S.* whom they meant to examine, this does not give the other side a right to cross-examine Captain *Hugh S.*, as he was only examined by mistake. *Clifford v. Hunter*, 16

2. On the trial of an indictment for a rape, it was held that the prisoner's counsel might ask the prosecutrix the following questions, with a

DAMAGES, LIQUIDATED. 649

view to contradict her. "Were you not on — (a day since the time of the alleged offence,) walking in the High Street, at O., to look out for men?" "Were you not on — (since the time of the alleged offence,) walking in H. Street, with a woman reputed to be a common prostitute?"

Held also, that evidence might be adduced by the prisoner, to shew the general light character of the prosecutrix, and that general evidence might be given of her being a street walker; but *semble* that evidence of specific acts of criminality by her, would not be admissible. *Rex v. Barker*, 589

CRUELTY TO CATTLE.

Bull-baiting is not punishable under the stat. 3 Geo. 4, c. 71, for preventing cruelty to cattle, as bulls are not included in that statute. If a writ of *habeas corpus* be granted, on the ground that the party has been illegally committed by a magistrate, the Judge will not make it a part of the rule for issuing the writ, that the party shall not bring an action against the magistrate. *Ex parte Hill*, 225

CUXHAVEN.

See *INSURANCE*, 1.

DAMAGES, LIQUIDATED.

In an agreement for the sale of a public-house, it was stipulated, that the seller should not be concerned in carrying on the business of a publican, within a mile from the house he had parted with, "under the *penal* sum of 500*l.* the same to be recoverable as and for *liquidated damages*." Notwithstanding this, he opened a public-house, about three quarters of a mile off. No evidence of actual damage was given by the plaintiff, but for the defendant some witnesses stated that the plaintiff had spoken of the injury as not considerable. It was held at

Nisi Prius, that the whole sum was recoverable as stipulated damages, but left to the Jury to state what was the actual damage. The Jury found for the whole sum, and the Court of Common Pleas refused to grant a new trial. *Crisdee v. Bolton*, 240

DECLARATIONS.

See EVIDENCE, 4, 8.

DECLARATIONS IN ARTICULO MORTIS.

See DYING DECLARATIONS.

DEMURRAGE.

See AGREEMENT, 5.

DEMURRER, TO AN INDICTMENT.

See PRACTICE, 4.

DEPOSIT.

See AUCTION, 1.

1. The Lord Chief Justice will not try an action for money had and received, to recover back a deposit paid to abide the event of a wrestling match, which did not take place. *Kennedy v. Gad*, 376

DEPOSITIONS.

See ADMISSION, 1.

1. A witness examined on the trial of an issue out of Chancery, died; a new trial was granted, and on the new trial parol evidence was allowed to be given of what this witness had deposed on the former trial, notwithstanding there was the usual order for reading the depositions in equity of such witnesses as had died since the first trial. *Tod v. Earl of Winchelsea*, 387

DETINUE.

1. If a person who writes an answer to a demand made upon another person of certain things, says, that he has got them, and thereby induces

DYING DECLARATIONS.

the claimant to bring an action against him, he is liable to such claimant, in detinue, although it does not appear that he had the general controlling power over the things. *Hall et Uz. v. White*, 136

DILAPIDATIONS.

See LANDLORD AND TENANT, 2.

DISCHARGE OF JURY.

See LEGITIMACY, 2.

DISCONTINUANCE.

See PLEADING, 1.

DISTRESS.

See JOINT-TENANT, 1.

DOCK-COMPANY.

A Dock-Company having a swing bridge on a public highway, are bound, in the passing of vessels, to use all reasonable means (both as to the number of men employed and the number of ships passed at a time) to prevent unnecessary delay; and if they do not do all which can be expected of reasonable men, and any one is obstructed in consequence, such obstruction will make them liable in damages for the injury sustained. *Wiggins v. Boddington*, 544

DWELLING-HOUSE.

See BURGLARY, 1.—PLEADING, 2.

DYING DECLARATIONS.

A declaration in *articulo mortis*, made by a child only four years old, is not admissible in evidence, on the trial of an indictment for the murder of such child; because a child of such tender years could not have had that idea of a future state which is necessary to make such a declaration admissible. *Rex v. Pike*, 598

2. To render the declaration of a

deceased person admissible on the trial of an indictment for manslaughter, it must have been made by him under an impression of almost *immediate* dissolution; and it is not enough that the deceased should have thought that he should ultimately never recover. *Rex v. Van Butchell*, 629

3. Before a declaration of a deceased person is received as a declaration in *articulo mortis*, the Judge will hear all that the deceased said respecting the danger in which he considered himself to be; and it will, upon this, be for his Lordship to decide, whether the deceased then had that impression on his mind, which would render his declarations admissible. *Ibid.*

EJECTMENT.

See LANDLORD AND TENANT, 6.

1. If in an ejectment a landlord and tenant defend by different attorneys, and have different counsel, but it appear that the tenant claims no title but what he derives from the landlord, the Judge at the trial will only allow one counsel to address the Jury for the defence, but the party's counsel who does not address the Jury will be at liberty to cross-examine, and also to call witnesses. *Doe d. Hogg v. Tindale*, 565

2. If in an ejectment it be proved that the lessor of the plaintiff let the *locus in quo* to a tenant who held peaceable possession for about a year, this is sufficient evidence of title, as against a party who came in the night, and forcibly turned such tenant out of possession. *Doe d. Hughes v. Dyball*, 610

ELECTION.

1. A mercer furnished ribands to a person who was a candidate for the representation of a city in Parliament; the ribands were partly used as presents for voters; the mercer was him-

self a voter, and received orders for some of the ribands, from the candidate himself, in his committee-room, but was not told for what purpose they were wanted: *Held*, that he was entitled to recover the price of the ribands from the candidate, notwithstanding the provisions of the stat. 7 & 8 W. 3, c. 4. *Richardson v. Webster*, 128

2. At a general election, *A.* was, after a contest, returned to serve in Parliament; *A.* died before the next meeting of Parliament: *Held* that, immediately on his death, the representation of that place "became vacant," within the meaning of the treating act, 7 & 8 W. 3, c. 4; and that if *B.*, who was neither a candidate nor the agent of a candidate, canvassed for *C.*, and ordered beer for the voters, after such vacancy, this was within the act, even though it was not proved that *C.* either knew of the canvass or of the treating: and it was therefore held, that an inn-keeper could not recover against *B.* for beer supplied to those voters by his order.

The treating act extends to an unsuccessful candidate who did not come to the poll. *Ward v. Nanney*, 399

EMBEZZLEMENT.

1. If a prisoner, indicted for embezzlement, does not know the specific acts of embezzlement intended to be charged against him, he should apply to the prosecutor for a particular of the charges; and if it be refused, the Judge will, on motion, supported by proper affidavits, grant an order for such particular to be given, and postpone the trial, if necessary.

Such particular ought, at least, to state the names of the persons from whom the money is alleged to have been received.

It was the duty of a clerk to receive monies daily at N., to enter all such

monies so received in a book, and to remit the amount weekly to L. His entries were all correct, and admitted the receipt of all the monies; but he did not remit them to L., as was his duty: *Held*, no embezzlement. *Rez v. Hodgson*, 422

ESCAPE.

1. The clerk of the bails of the Mayor's Court of London, in pursuance of a practice in that Court, refused to accept bail for a defendant, who was sued jointly with another person, unless it was also given for such other person: *Held*, that this refusal was no answer to an action against a Serjeant-at-mace from whose custody that defendant, for whom bail was offered, had escaped. *De Vaux v. Sewell*, 182

2. In an action against the marshal for an escape, the allegation in the record in the original action is *prima facie* evidence that the party was committed to his custody. *Pheney v. Jones*, 333

EVIDENCE.

See ADMISSION.—AGENT.—ASSUMPSIT, 2.—BANKRUPT, 1, 3.—BENEFIT SOCIETIES.—BILL OF EXCHANGE, 1.—BROKER, 1.—CONFESSION.—CONVERSION, 1.—CROSS-EXAMINATION.—DETINUE, 1.—DYING DECLARATIONS.—ESCAPE, 2.—FORGERY.—INSURANCE, 4.—LIBEL, 6.—PATENT, 1.—PERJURY, 2, 3.—PROMISE OF MARRIAGE, 1.—TRESPASS, 4. 5.—WITNESS.

1. The plaintiff wrote a letter to the defendant, which the defendant did not answer. At the trial, the plaintiff's counsel called for it under a notice to produce, and wished to give evidence of its contents:—*Held*, that such evidence was not admissible: but that if, by the letter, the plaintiff demanded a certain sum, so much only of the copy of it might be read

as stated the sum demanded. *Fairlie v. Denton* and another, Gents., two, &c., 103

2. In an action against attorneys for negligence in not making a motion to set aside proceedings for irregularity, if the declaration aver, as the consequence of the neglect, a judgment by default and further proceedings, and final judgment and execution, an examined copy of the record must be given in evidence, to prove both the judgments; and it is not enough to produce entries in the Prothonotary's book, and the inquisition, with the Prothonotary's allocatur.

Semble, that, in such a case, the judgments are of the gist of the action, and not merely special damage.

Semble, also, that a writ intended for the father, served upon the son, who answers to the name of the father, that being his own name also, is sufficiently served if it come to the hands of the father before its return. *Godefroy v. Jay*, 192

3. In an action by the indorsee of a bill of exchange, accepted in a foreign country, against a party in London who undertook to negotiate it, for not paying over the proceeds, which is tried after the bill has become due, parol evidence may be given of the particulars of the bill.

Semble, that, if the declaration in such case allege that the proceeds were received, some evidence of the receipt must be given by the plaintiff at the trial; and a letter written by the defendant, a month before action brought, saying that the money would be received in a few days, is not sufficient. *Hunt v. Alewyn*, 284

4. *A.* sued out a writ of *fi. fa.* against the goods of *B.*, and the sheriff executed a bill of sale of certain goods to *A.* After this, *B.* remained in possession of the goods, and the sheriff again took them, under another execution against *B.*:—*Held*, that, in an action brought by *A.*

against the sheriff for taking these goods, the declarations of *B.* were evidence for the defendant, to shew that *A.*'s execution was merely colourable. *Willies v. Farley*, 395

5. A will of lands *executed* more than thirty years ago, is admissible in evidence without calling the subscribing witness, although the testator has died within thirty years, and it be proved that one of the subscribing witnesses is still alive. *Doe d. Oldnall v. Deakin*, 402

A. claimed in ejectment as heir-at-law of *B.* *A.* traced his pedigree through the youngest son of a common ancestor, who, in the year 1689, had four elder sons, whose descendants (if any) would have had a better title than *B.*: *Held*, that the length of time was a sufficient ground to presume their deaths; and that the Court would take it that they all died without issue, unless there was some evidence to induce a presumption that they, or some of them, married and left issue. *Ibid.*

6. No communications made to an attorney are privileged, but such as are made for the purpose of the attorney's either commencing or defending a suit. *Broad v. Pitt*, 518

7. A clerk in a merchant's counting house may be called as a witness to explain the meaning of a particular entry in the books of the office made by a fellow-clerk, since deceased. *Hood, Assignee of Green, v. Reeves*, 532

8. A lease purported to have been signed by the mark of the party. A person proved the hand-writing of the subscribing witness, and that he had gone abroad; and another person proved that the defendant had spoken of the term that he had under the lease. *Held*, that this was sufficient proof of the execution of the lease by the defendant. *Doe d. Wheeldon v. Paul*, 613

8. Where it appeared on the record, that an agreement sued on was

made by the plaintiff on behalf of himself and the other proprietors of a theatre; evidence of the declarations of one of such other proprietors was held admissible on the part of the defendant. *Kemble v. Farren*, 623

9. The office copy of an insolvent's petition, attested by the officer of the Insolvent Debtors' Court, is sufficient evidence to prove an allegation that the petition *subscribed* by the insolvent was duly filed.

A letter written to the chief commissioner of the *Insolvent Debtor's Court*, by an opposing creditor, previous to the hearing of an insolvent's case, is not a privileged communication. *Gould v. Hulme*, 625

EXECUTION.

Whether a woman, who has cohabited with a man for several years, and passed herself off as his wife, can recover in trespass for the taking, under an execution against the man, of her goods being in the house in which the cohabitation took place—*Quære*. But in such a case, it may be left to the Jury to say, whether they think, that, under the circumstances, the property was given up by the woman to the man; and if they do, they may find a verdict against her. *Edwards v. Farebrother*, 524

EXECUTORS AND ADMINISTRATORS.

~See AGREEMENT, 2.

A plaintiff sued as executor, and in his declaration made *proferri* of the letters testamentary in the usual form, which states, "whereby it appears to the Court here that the plaintiff is executor," &c. The defendant did not demand oyer, but pleaded that the plaintiff never was nor is executor "in manner and form" as alleged in the declaration. The plaintiff replied that he was, and continued to be executor in manner and form,

x x

&c.:—*Held*, that the plaintiff might recover on this issue, although he had not taken probate till some months after the declaration. *Thompson v. Reynolds*, 128

FACTOR.

Acceptances of a factor for his principal, which are provided for by the principal before they become due, do not constitute such a demand against the principal as to enable the factor, previous to the 1st of October, 1826, when the 2nd section of the 6 Geo. 4, c. 94, came into operation, to pledge the warrants for goods belonging to the principal, as a security for advances made to himself. *Blandy v. Allan*, 447

FALSE PRETENCES.

Indictment for false pretences in passing a note of a bank that had stopped payment as a good note. The prisoner knew that the bank had stopped payment; but it appeared that two only of the partners of the bank had become bankrupt, and that the third had not:—*Held*, that the prisoner must be acquitted. *Rex v. Spencer*, 420

FORFEITURE.

See LANDLORD AND TENANT, 6.

FORGERY.

1. If on an indictment for forgery being presented to the Grand Jury, it appear that the forged instrument cannot be produced, either from its being in the hands of the prisoner, or from any other sufficient cause—they may receive secondary evidence of its contents. *Rex v. Hunter*, 591

2. An indictment for forgery being presented to the Grand Jury, a witness declined to produce certain deeds before them:—*Held*, that if the deeds form a part of the evidence of the witness's title to his own estate, he

GROWING CROPS.

is not compellable to produce them, but that, if they do not, the Grand Jury may compel their production. *Ibid*.

GOODS NOT ACCORDING TO ORDER.

If one order a certain machine, e. g. a threshing-machine, which, when sent to him, turns out to be unfit for use, he should *either* return it immediately, *or else* give immediate notice to the vendor to fetch it away; for if he keep it a long time without doing either, he will be taken to have waived all objections to its goodness. *Cash v. Giles*, 407

GOODS SOLD.

See AGREEMENT, 9.

1. If one of several partners be concerned in preparing the prospectus of a projected newspaper, which prospectus states, that he and others will act as treasurers and managers, and also that the subscribers are not to be partners, nor to be answerable for more than their subscription; and be also aware, that a particular individual is to be sole nominal proprietor; the firm of which such partner is a member, (although he has not taken any share in the paper), cannot sue the subscribers who have taken shares for the price of goods furnished for the paper. *Batty v. M'Cundie*, 202

2. If goods be sold on a credit, the vendor cannot, before the credit has expired, maintain *assumpsit* for goods sold, even though he can prove that the goods were not bought in the fair way of trade, but for the fraudulent purpose of being immediately resold at an under price:—*Semble*, that trover is his proper remedy. *Ferguson v. Carrington*, 457

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See ACCOUNT STATED, 1.

GUARANTY.

1. *A.* applied to *B.* for goods; *B.* asked for a reference; *A.* referred him to *C.*; *C.*, on being applied to, inquired the amount of the order, and on what terms the goods were to be furnished; and on being told, said, "You may send them, and *I'll take care that they are paid for at the time.*" He was afterwards written to, to accept a bill for the amount; to which he replied, that he was not in the habit of accepting bills, but that *the money would be paid when due.* After this *B.* the seller wrote to *C.* about the goods, and spoke of them in his letter as goods which *C.* had "*guaranteed;*" and the attorney of *B.*'s assignees (when he had become bankrupt) wrote to *A.* for the money, and threatened process; but this letter was a circular, written in pursuance of a list made out for him by *B.*, and without any knowledge of the circumstances under which the debt was contracted:—*Held*, that, on this evidence, *C.* was not primarily liable, but only as a guarantor of the debt of *A.* *Rains and Another, Assignees of Evelyn, v. Storry,* 130

2. A guarantie for goods, addressed to one of two partners, may be declared on, as given to both, if it appear that the partner to whom it was addressed did not carry on any separate buisness.

A guarantie not addressed to any one, must be declared on as given to the party to whom or for whose use it was delivered. *Walton v. Dodson,* 162

HAMBURGH.

See INSURANCE, 1.

HIRE.

Where a carriage is hired for a certain time, and sent back before the expiration of it, if the party of whom it was hired sell it within the time, he

cannot recover his charge for the hire. *Wright v. Melville,* 542

HOUSE BREAKING.

See BURGLARY, 1.

HUNTING.

See TRESPASS, 1.

HUSBAND AND WIFE.

See WITNESS, 9.

If an action is brought against a husband for the price of goods supplied to his wife, who is living with him, it lies on the husband to shew that the goods were furnished under such circumstances, that he is not liable to pay for them. But if the goods be supplied to his wife when she is living *separate and apart* from the husband, it is incumbent on the tradesman to prove that the separation occurred under such circumstances as will make the husband liable. *Clifford v. Laton,* 15

ILLEGITIMATE CHILD, MAINTENANCE OF.

If a person know that his illegitimate daughter, of the age of 16, is boarded and clothed by the plaintiff, and neither expresses dissent, nor takes his daughter away, he is liable to pay the plaintiff for such board and lodging without any express promise to do so. And it lies on the defendant to shew that his daughter was boarded and lodged by the plaintiff against his consent, or that he has refused to be at the expense of maintaining her. *Nichole v. Allen,* 36

INDICTMENT.

See BENEFIT SOCIETIES, 1.—BURGLARY, 1.—COIN, 1.—MANSLAUGHTER, 2—VARIANCE, 1.

1. If two bills of indictment be preferred for the same offence, the one charging it capitally, the other as a misdemeanor, and both be found,

the Judge will put the party to his election which he will go upon, and direct an acquittal on the other. *Rex v. Smith*, 412

2. If an indictment contain two counts, one charging the offence as a larceny, the other as a receiving, the Judge will put the prosecutor to elect which he will go upon. *Rex v. Flower*, 413

INFANCY.

If proper clothes are supplied to an infant by his father, any others furnished in addition cannot be considered as necessities; and it is the duty of a tradesman, when applied to by an infant for clothes, to make inquiries of his friends, before he gives him credit. *Cook v. Deaton*, 114

INQUISITION.

See CORONER'S INQUISITION.

INSANITY.

No person can, in defending an action, be allowed to stultify himself: and therefore, a defendant cannot, in an action for work and labour, set up his own insanity as a defence, unless he has been imposed upon by the plaintiff, in consequence of his mental imbecility. *Brown v. Jodrell*, Esq. 30

INSOLVENT.

See EVIDENCE, 9.

The assignment to the provisional assignee of the Insolvent Debtors' Court, is not made void by the death of the insolvent before his petition has been heard; and such provisional assignee may, after such death, assign to the assignee for the creditors; and they may bring actions in respect of the insolvent's property. *Willis and Another v. Elliott Senr.* 117

INSURANCE.

1. If a policy of insurance at and from H. to V., contain the following

INSURANCE.

warranty, "warranted in port on the 19th October, 1825." This warranty applies to the port of H. only, and not to any other port.—*Cuxhaven, is no part of the port of Hamburg. Colby and Others v. Hunter*, 7

2. If a new ship is insured, "on a voyage from Bristol to New York, during her stay there, and back to her port of discharge," and on her passage back from New York to England sustains an injury, which requires her to be repaired, the underwriter is not entitled to deduct one-third new for old, as the whole is to be considered only one voyage. *Fenwick v. Robinson*, 323

3. If A., being indebted to B., die, and C. agree to pay the debt by instalments, in five years, A. has an insurable interest in the life of C. for those five years. If the assured, at the time of effecting the policy, conceals any thing which is material for the insurer to know, the policy is void; and it makes no difference whether the assured considered it material or not: and what amounts to a misrepresentation, or to a material concealment, is a question for the Jury. The fact, that, on a life policy, an unusually high premium was paid, is quite immaterial, and is therefore not to be taken as proof that the office considered the party to be a bad life. *Von Lindenau v. Desborough*, 353

4. In *assumpsit*, on a policy of insurance, the Jury ought not to allow the plaintiff interest, unless evidence be given that he had applied to the underwriter, to settle the loss, soon after it happened, and notified to him the ground of such application.—Lloyd's list is evidence against the assured, if it be shewn that the broker had read it, before the policy was effected.—A ship stayed at a particular port, for a period of one hundred and nine days, and whether this was an unreasonable time, was held to be a

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question of fact for the Jury. *Bain v. Case*, 496

INTEREST.

See INSURANCE, 4.—IRISH JUDGMENT.

The Courts have so often decided that interest is not recoverable in an action for money had and received, that the Judge at *Nisi Prius* will not allow the point to be entered into. *Depcke v. Munn* and Another, 112

IRISH JUDGMENT.

In an action on an Irish judgment, the question, whether any and what interest is recoverable, is a question for the Jury, under all the circumstances of the case. And in deciding this question, they will have to consider whether the plaintiff has taken proper steps to find his debtor and follow up his judgment by an execution, or whether he has been guilty of *laches*. *Bann v. Dalzell*, 376

JOINT-TENANT.

One of several joint-tenants may sign a warrant of distress, if the others do not forbid him. If they, when applied to, merely *decline to act*, that will not prevent him from proceeding. *Robinson v. Hoffman*, 234

JURY.

See PRACTICE, 3.—LEGITIMACY, 2.

JURY, SPECIAL.

See TALES, 1.

KEEPING A VICIOUS ANIMAL.

In an action for an injury by a vicious bull, the plaintiff recovered, although it appeared that the bull was attracted by a cow in a particular state, which the plaintiff was driving past the field in which the bull was, and that the plaintiff first struck the bull on the head, to drive him away from the cow.

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Semble, that the owner of a vicious animal, after notice of its having done an injury, is bound to secure it at all events, and is liable in damages to a party subsequently injured, if the mode he has adopted to secure it proves to be insufficient. *Blackman v. Simmons*, 138

LANDLORD AND TENANT.

See AGREEMENT, 1, 2, 3, 4, 7.—NOTICE, 2.

1. *Semble*, that if a tenant pays taxes, which he alleges ought to have been paid by his landlord, and afterwards pays rent for two years subsequently, without making any deduction, he cannot recover the amount in an action against the landlord. *Semble*, also, that a broker, who, when receiving rent under a distress, deducts a sum purporting to be for land-tax, is not to be considered as *allowing* the land-tax, so as to affect the landlord's right, but as merely, from not knowing how to act, consenting to receive the money, without the sum deducted. *Saunderson v. Hanson*, Gent. &c. 314

2. A party occupied premises, under an agreement for three years, at 45*l.* a-year, which expired at Midsummer, 1826; he did not then go out, nor did his landlord take any steps to compel him, but at the Michaelmas following gave him notice to quit, at Lady-day, 1827, or pay the rent of 50*l.* a-year. He continued in, but refused to pay more than the 45*l.* rent:—*Held*, that, under the circumstances, he must be taken to have acquiesced with the new proposal, and was bound to pay the rent of 50*l.* *Roberts v. Hayward*, 432

3. *A.* agreed to take an assignment of a lease of a house, which was out of repair, from *B.*, and by the agreement it was stipulated, that all out-goings should be paid by *B.* up to April 23rd; and, by an assign-

ment indorsed on the lease, (executed by *B.* but not by *A.*), *B.* assigned the residue of the term, subject to the performance of all the covenants of the lease, which, from the 22nd day of April, ought to be observed on the part of the tenant. The lease contained a covenant to keep the premises in repair, and so to deliver them up; and, after the assignment, the reversioner sued *B.* and recovered for dilapidations which occurred before April 22nd:—*Held*, that *B.* could not maintain an action on the case against *A.* for these dilapidations, even though it could be proved that *A.* gave a smaller price, because the premises were out of repair:—*Held*, also, that the Judge could not look beyond the written instruments, viz. the written agreement and the assignment.—If *B.* assign the lease of a house to *A.* by deed, subject to certain covenants, and *A.* take possession, whether *B.*'s remedy for a breach of the covenants is by an action of covenant, though *A.* never executed the deed—*Quære. Hawkins v. Sherman*, 459

4. A landlord has no right to enter his tenant's premises to repair them, without some stipulation to that effect. *Barker v. Barker*, 557

5. The putting up of a board for the purpose of letting houses by a person who built them and agreed to become tenant of them from a certain time, is sufficient to enable the person for whom they were erected to recover rent on a count for use and occupation. *Sullivan v. Jones*, 579

6. In ejectment to recover demised premises, for non-payment of rent, under the usual proviso for re-entry, on non-payment for twenty-one days; it appeared that the rent was payable quarterly, and that a demand of more than one quarter's rent was made on the 21st day, at 1 o'clock:—*Held* that only one quarter's rent

should have been demanded, and that at sun-set. *Doe dem. Wheeldon v. Paul*, 613

LARCENY.

1. If the servant of the owner of property find a party actually committing an offence against the stat. 7 & 8 Geo. 4, c. 29, (the larceny act) and apprehend him under sect. 63 of that act, and, while taking the party to a magistrate, such party kill him, this will be murder; but if the servant either did not see him in the actual commission of the offence, or be taking him to any other place than before a magistrate, it will not be murder. *Rez v. Curran*, 397

2. If the only evidence against a prisoner charged with a larceny be that stolen property was found in his possession three months after the loss of it, the Judge will direct an acquittal, without calling upon him for his defence. *Rez v. Adams*, 600

LEASE.

See AGREEMENT, 2.

An agreement "between *A. B.* and *C. D.*," by which "*A. B.* agrees to pay *C. D.* 140*l.* a year, in quarterly payments, for a house, garden, &c., (describing the situation), for the term of seven, fourteen, or twenty-one years, at the option of the tenant, the rent to commence from the 1st January," &c., is a lease, and not merely an agreement for one. *Wright v. Trevezant*, 441

LEGACY.

Where an account of the residuary estate of a testator has been made out by the executors, and signed by the parties interested, under which account all of them have been paid except one, such one may recover his proportion, with interest, in *assumpsit*, against the executors. *Gregory v. Harman*, 205

LEGITIMACY.

1. Every child, born in wedlock, the husband and wife being in England, and not separated by any sentence of divorce, is presumed to be legitimate; but this presumption may be repelled, by proof of such facts as satisfy the Jury that *no* sexual intercourse took place between the husband and wife, at a time when the husband could, by possibility, be the father of the child; and the Jury, before they can find against the legitimacy, must be convinced that *no* such sexual intercourse took place, by irresistible evidence, and not by a mere balance of probabilities. If such intercourse did take place, the adultery of the wife is immaterial; and if there was an *opportunity* of sexual intercourse between the husband and wife, the law presumes that such intercourse *did* take place, unless the contrary be satisfactorily proved. *Morris v. Davies*, 215

2. If husband and wife are in such a situation that sexual intercourse *might* have taken place, the law presumes that it *did* take place, unless such facts are proved as satisfy the Jury *beyond all doubt* that no such intercourse did take place; and, therefore, unless such facts are proved, a child born of the wife is legitimate, if the husband and wife were in such a situation that sexual intercourse might have taken place between them, at a time, when, by the course of nature, the husband could have been the father of the child.

If, after the trial of an issue out of Chancery, the Jury are locked up for many hours, and are not likely to agree when the Judge is about to leave the town, the Judge will discharge them of his own authority, if the parties decline consenting to their discharge; but if a Jury be under such circumstances in a cause depending between party and party, *semble*, that the Judge would order

that the Jury should follow him in a cart. *Morris v. Davies*, 427

LIBEL.

1. Communications made to a member of a dissenting congregation, respecting an individual about to be appointed a minister of that congregation, are privileged communications, and cannot be made the subject of an action by such individual. But if, in consequence of these communications, a printed circular be sent round, containing contradictions of them, and reflecting on the motives of the party who made them, and such party afterwards write a letter, and send it to the writer of the circular, in which, after repeating the communications, he adds other statements, which he acknowledges he cannot prove, such letter is not privileged, but will make him liable in damages, though it be specially found by a Jury that he was not actuated by *express malice*. In such an action, a letter written to the defendant, containing a statement of the facts upon which he founded his charges, is receivable in evidence on his behalf, to shew the *bona fides* with which he acted. *Blackburn v. Blackburn*, 146

2. A circular letter sent by the secretary to the members of a society for the protection of trade against sharpers and swindlers, furnishing information respecting certain bill transactions, is not a privileged communication. *Semble*, that if such letter state particular facts, it will not be a libel, though some of the persons receiving it believed that it was sent to intimate that the parties mentioned in it were common sharpers and swindlers. Otherwise, if it had contained a *general statement*, such as that the party mentioned in it is considered an improper person to be proposed to be ballotted for as a member of the society. At all events, in the former case, it is a question for the Jury,

whether the society really and *bond fide* intended to give the *particular information* which the letter contains. *Gettling v. Foss*, Gent. 160

3. In a joint action for a libel by two partners, damages cannot be given for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business. *Haythorn v. Lawson*, 196

4. An officer in the navy has no right to make communications upon subjects, with which he becomes acquainted in his professional capacity, except to the Government; and therefore, a letter written to Lloyd's Coffee-house, about the conduct of the captain of a transport ship, by a lieutenant, who was superintendant on board, is not a privileged communication; nor can evidence of this being the practice for persons so circumstanced to make communications to Lloyd's, be received in an action for libel against such a person, either as furnishing a defence, in conjunction with other circumstances, or in mitigation of the damages to be recovered. *Harmood v. Green*, 141

5. In an action for a libel, contained in a printed paper, circulated in a sale room, previous to the sale of an arbitration bond given by the defendant to the plaintiff as a surety for a third person, and which was advertized as an ordinary money bond, pending a writ of error and a suit in equity,—it appeared, that the printed paper charged the plaintiff with an intention of extorting money by threats, and spoke of the sale as a "wicked expedient." And it also appeared, that the plaintiff, before the writing of the paper, said, on the refusal of the defendant to pay him a certain sum, which he demanded, that he would advertize the bond, and the defendant should see the advertisement under his nose at breakfast. It was left to the Jury at *Nisi Prius*, to

say whether, under all the circumstances, the defendant was acting *bond fide*, and the objectionable remarks were relevant, and exceeding only from warmth of feeling the bounds of moderation, or whether they were wholly irrelevant, and he went out of his way purposely to slander the plaintiff. The Jury found for the defendant; but the Court of Common Pleas granted a new trial, on the ground, that the defendant's expressions went far beyond the limits of a privileged communication, and must be considered as clearly libellous, without any proof of express malice. *Robertson v. Macdougall*, 259

6. Whatever is fairly written of a work, and can be reasonably said of it, or of its author, as connected with it, is not actionable, unless it appear that the party, under the pretext of criticising the work, takes an opportunity of attacking the character of its author.—In cases of libel, a subsequent publication, brought out even after issue joined, may be evidence to shew the motives of the party.—An admission signed by the defendant's attorney, consenting to admit the defendant to be editor of a periodical work called "The Lancet," is no evidence that the defendant was editor on a day subsequent to the date of such admission. *Macleod, M. D. v. Wakley*, 311

7. If a master, in giving the character of a servant in a letter state certain facts, the master, in the defence of an action brought by the servant for libel, is not bound to prove the truth of every fact he stated: it is enough, that he give such evidence as convinces the Jury that he wrote what he did with an honest belief of its truth. *Semble*—that a character of a servant, if given *bond fide*, is a privileged communication, although it had not been applied for. *Pattison v. Jones*, 383

8. If, in an action for a libel, the

LIMITATION, STATUTE OF.

defendant plead justifications, without pleading the general issue, and the affirmative of the issue be on the defendant, he is entitled to begin, and the plaintiff has not, in such case, a right to begin, with a view of proving the amount of his damages. *Cooper v. Wakley*, 474

9. If a defendant, in an action for libel, imputing want of skill to a surgeon, plead that the plaintiff did want skill, and that he performed an operation in an unsurgeonlike manner, occupying unnecessary time, and causing unnecessary pain, these are all affirmatives on the part of the defendant. *Ibid.*

10. In an action for a libel, the defendant cannot, under the general issue, give evidence of any fact in mitigation of damages, which would be evidence to prove a justification of any part of the libel. He ought to justify as to that part. *Vessey v. Pike*, 512

LIEN.

A livery stable keeper has a lien for the keep and exercise of a horse sent to him for the purpose of being trained. *Bevan v. Waters*, 520

LIMITATION, STATUTE OF.

See ANNUITY, 1.

1. If one of two partners has become bankrupt, and obtained his certificate, and after that he acknowledges a debt due to the plaintiff by his partner and himself; this acknowledgment is not sufficient to take the case out of the statute of limitations, in an action against him and his partner for such debt, if his partner plead the statute of limitations, and he plead his bankruptcy. *Martin v. Bridges and Elmore*, 83

2. A party borrowing money gave the lender a paper in the following form:—"I owe you one hundred pounds, Charles Roberts, 30th July,

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1821." Underneath was written, "August 17th, received fifty pounds, Charles Roberts:—*Held*, in an action by the lender, to which the statute of limitations was pleaded, that the latter memorandum, which was within the six years, did not constitute such an acknowledgment of the existence of the debt mentioned in the former, as to take it out of the operation of the statute. *Roberts v. Roberts*, 296

3. It has frequently been held at *Nisi Prius*, that the 1st sect. of the 9th Geo. 4, c. 14, applies to parol acknowledgments made before its provisions came into operation:—and *semble*, that from its wording such construction is the right one. *Ansell v. Ansell*, 563

LIVERY-STABLE KEEPER.

See LIEN, 1.

LONDON.

See ANCIENT LIGHTS.

LUNACY.

See INSANITY, 1.—PROMISSORY NOTE, 1.

MAINTENANCE OF ILLEGITIMATE CHILD.

See ILLEGITIMATE CHILD, 1.

MALICIOUS ARREST.

See ARREST, 1.

In a declaration for a malicious arrest, the termination of the former suit was alleged thus:—"That the defendants did not prosecute their suit, but therein wholly failed and made default, and thereupon it was considered that they should take nothing by their bill, and that their pledges should be in mercy, and the plaintiff go thereof without day," *prout patet per recordum*:—*Held*, that this allegation was not proved by the production of a rule to discontinue on

payment of costs, and the proof of the payment of such costs:—

Held, also, that the Court cannot reject the allegation of the judgment of *nonpros*, as, without that, it would not be shewn how the suit was terminated:—

Held, also, that this was not a variance amendable under the stat. 9 Geo. 4, c. 15. *Webb v. Hill*, 485

MANSLAUGHTER.

1. A party, causing the death of a child, by giving it spirituous liquors, in a quantity quite unfit for its tender age, is guilty of manslaughter. *Rex v. Martin*, 211

2. An indictment for manslaughter described the deceased, who was a Peer of Ireland, as "H. S., Baron M. of C., in the county of R., in that part of the United Kingdom called Ireland." It was proved that H. was his christian name, S. his family surname, and Baron M., &c., his title:—*Held*, no variance, and that the Court was not bound to construe H. S. to be one christian name. *Rex v. Brinklett*, 416

3. If a person, *bonâ fide* and honestly exercising his best skill to cure a patient, perform an operation which causes the patient's death, he is not guilty of manslaughter; and it makes no difference whether such person be a regular or an irregular surgeon, nor whether he has had a regular medical education or not. *Rex v. Van Butchell*, 629

4. A person in the habit of acting as a midwife, tore away a part of the prolapsed uterus of one of his patients, supposing it to be a part of the placenta, by means of which the patient died:—*Held*, that this person was not indictable for manslaughter, unless he was guilty of criminal misconduct, arising either from the grossest ignorance, or the most criminal inattention. *Rex v. Williamson*, 636

MARRIAGE.

See PROMISE OF MARRIAGE.

MASTER AND SERVANT.

1. If a master sends his servant on an errand, without providing him with a horse, and the servant takes one, and rides it in the doing of such errand, and an injury happens in consequence, the master is not liable in an action for damages by the party injured. *Goodman v. Kennell*, 167

2. If the contract between master and servant be the usual one for a year, determinable at a month, the servant, if turned away improperly, cannot recover on a count stating the contract to be for an entire year; and he cannot, on the common count for wages, recover for any further period than that during which he had served. *Archard v. Hornor*, 349

3. A servant being engaged for a year at thirty guineas and a suit of clothes, was provided with a livery suit on his entering the service. He was wrongfully turned away within the year:—*Held*, that he could not maintain trover for the clothes, that not being the proper form of action. *Crocker v. Molyneux*, 470

MAYOR'S COURT, LORD.

See ESCAPE, 1.

MONEY HAD AND RECEIVED.

See BANKRUPT, 1.—INTEREST.—SURVEYOR OF HIGHWAYS, 2.

A. was indebted to B. in a sum of 868*l.*, for which he was arrested. C., who was clerk to B.'s attorney, directed him to be discharged on paying 700*l.* only. B. threatened to complain to C.'s employers; to prevent which, C. advanced 100*l.*, B. agreeing that it should be repaid whenever the balance of 168*l.* should be recovered from A. After the

death of *B.* and *C.*, the balance was recovered:—*Held*, that the representatives of *C.* might recover the 100*l.* from the representatives of *B.*, on a count for money had and received to their use, and that there was no necessity to declare specially. *Platts v. Lean*, 561

MURDER.

See LARCENY, 1.

1. If game-keepers attempt to apprehend a gang of night poachers, and one of the game keepers be shot by one of the poachers, this will be murder in all the poachers, unless it be proved that either of them separated himself from the rest, so as to shew that he did not join in the act. *Rex v. Edmeads*, 390

2. Where game-keepers had seized two persons who were poaching in the night, and they (having surrendered) called to a third, who came up and killed one of the game-keepers; this is murder in all, though the two struck no blow, and though the game-keepers had not announced in what capacity they had apprehended them. *Rex v. Whitthorne*, 394

3. An inquisition for murder, charging that the prisoner upon a new-born female child did make an assault, and the said new-born child, with "both her hands, in a certain piece of flannel, of no value, then and there feloniously, wilfully, and of her malice aforethought, did wrap up and fold, by means of which said wrapping up and folding the said new-born female child in the piece of flannel aforesaid, she the said new-born female child was then and there suffocated and smothered, of which said suffocation," &c. she instantly died; is good, although the inquisition does not go on to allege that the flannel was folded over the child's mouth, or inclosed the head, or the like.

It is no objection to the laying of the time in a coroner's inquisition,

that the offence is stated to have been committed on the "26th day June," omitting the word "of." *Rex v. Huggins*, 414

MUSIC ROOM.

1. The stat. 25 Geo. 2, c. 36, relating to places for public dancing, music, &c., extends to licensed taverns and hotels: and it is no defence, that the company frequenting the performances were respectable, or that the admission money was not received for the benefit of the keeper of the house.—The 13th sect. of that stat. which gives a form of declaration, extends to common informers. *Green v. Botheroyd*, 471
2. Form of declaration. *Ib.*

NEGLIGENCE.

See DOCK COMPANY, 1.—MASTER AND SERVANT, 1.—SHIP, 2.

1. If trustees under a paving act sign checks drawn by the clerk of the person who is clerk to the trust, those checks being drawn so as to be alterable from small sums to larger, the trustees cannot charge the clerk to the trust for negligence, if these are altered, as it was their duty not to sign checks drawn in such a form: nor can they charge him for misconduct of his clerk, which would have been prevented if the trustees had done their own duty in the way in which the clerk to the trust had fair reason to expect they would.

A count charging a clerk with negligence in suffering his employers to be defrauded of sums of money, without specifying any in particular, is bad.

If, by a private act of Parliament, forty-eight trustees are appointed, (not being a corporation), of whom sixteen are to go out annually by rotation; and, by the same act, the trustees are to sue and be sued in the names of their treasurers for the time

being: an action for money had and received may be maintained in the names of the present tressurers, although both they and the present trustees came into office since the time when the money was received by the defendant to the use of the trust.

Whitmore v. Wilks, 364

2. Though the rule of the road is not to be adhered to, if, by departing from it, an injury can be avoided; yet, in cases where parties meet on the sudden, and an injury results, the party on the wrong side should be held answerable, unless it appear clearly that the party on the right had ample means and opportunity to prevent it. *Chaplin v. Hawes*, 554

NEW TRIAL.

See RULE, GENERAL, 1.

NOTICE.

See BANKRUPT, 9, 10.—BILL OF EXCHANGE, 10.

1. Notice served on the attorney at 9 o'clock on Saturday night to produce papers at a trial in London on Wednesday, his client being absent in Scotland, is too late. *Vice v. Dow*. Visc. Anson, 19

2. A party took possession of premises on the 1st of August, and at the Michaelmas following paid the half quarter's rent, and continued afterwards to pay quarterly, on the usual feast days:—*Held*, that in such case a notice to quit at Michaelmas was sufficient, and that although the landlord had at first given a notice expiring with the half quarter, it was not necessarily to be presumed from that circumstance that the tenancy was one from year to year, commencing with the half quarter. *Doe dem. Savage v. Stapleton*, 275

NOTICE OF ACTION.

See SURVEYOR OF HIGHWAYS, 1.—TRESPASS, 2.—TROVER, 1.

PATENT.

OBSTRUCTING ANCIENT LIGHTS.

See ANCIENT LIGHTS.

ORDINARY.

See COLONIES, 1.

PARTICULAR OF CHARGES.

See EMBEZZLEMENT, 1.

PARTNERS.

See BANKRUPT, 8.—GOODS SOLD, 1.—LIBEL, 3.—LIMITATIONS, STAT. OF, 1.

PATENT.

1. If the shearing of cloth from list to list by shears be known, and the shearing it from end to end by means of rotary cutters be also known, and a person construct a machine to shear from list to list by means of rotary cutters; this is a new invention, and will entitle the inventor to maintain a patent for it.

If A., in 1818, take out a patent for "improvements in a machine for which J. L. took out a patent in 1815," it is necessary for A., on the trial of an action for the infringement of his patent, to put in J. L.'s patent and specification; but it is not material whether a machine made according to the specification of J. L. would be useful or not, if it be shewn that a machine constructed according to A.'s specification would be so. *Lewis v. Davis*, 502

2. If one take out a patent, and in his specification state certain improvements in the mechanical parts of his apparatus, which it appears he has invented after the taking out of the patent: this will not invalidate the patent, as the public ought to have the advantage of all improvements down to the time of the specification.

A specification of an invention, for which a patent had been granted, stated the invention to be an improved apparatus to extract gas from pit-

coal, tar, or any other substance from which gas, capable of being used for illumination, could be extracted by heat:—*Held*, that the words "other substance" must mean substance *ejusdem generis*, and that oil was not meant to be included in it, it being shewn, that, at the time in question, oil was considered much too expensive to be used for the making of gas for the lighting of streets and buildings, though it was known to afford an inflammable gas.

If in the specification of an improved gas apparatus no direction is given respecting a condenser, which is a necessary part of every gas apparatus; this will not invalidate the patent, if it appear, that every one capable of constructing a gas apparatus must know that a condenser must form a part of it. *Crossley v. Beverley*, 513

3. A patent was granted for a machine to sharpen knives and scissors, and in the specification this was directed to be done by passing their edges backwards and forwards in an angle formed by the intersection of two circular files—and in the specification, it was also stated, that other materials might be used according to the delicacy of the edge. It was proved that, for scissors, there ought to be one circular file, and a smooth surface, but that two Turkey stones might also succeed:—*Held*, that the specification was bad, as it neither directed the machines for scissors to be made with Turkey stones, nor to be made with one circular file and a smooth surface. *Felton v. Greaves*, 611

PAYMENT.

See ANNUITY, 1.

PERJURY.

See VARIANCE, 1.

1. A cause was referred by a Judge's order to *C. D.*, and by the order it was directed that the wit-

nesses should be sworn before a Judge, "or before a commissioner duly authorized." A witness was sworn before a commissioner for taking affidavits, and examined *videlicet* by the arbitrator:—*Held*, that a witness so sworn was not indictable for perjury. *Rex v. Hanks*, 419

2. To support an indictment for perjury committed on a trial at the Quarter Sessions, three witnesses, who heard the party examined, stated what he swore on that trial; and the party was convicted of perjury, although neither of the witnesses took down the evidence as it was given, and neither of them professed to state the whole of the evidence that he gave.

To shew that the perjury was wilful and corrupt, evidence may be given of expressions of malice used by the party towards the person against whom he gave the false evidence. *Rex v. Munton*, 498

3. An indictment for perjury, tried before the Lord Chief Justice, at *Westminster*, charged the perjury to have been committed on a trial at *Nisi Prius*, at the *King's Bench* Sittings. The prosecutor, to prove the trial at *Nisi Prius*, put in the *Nisi Prius* record, with the minute of the verdict indorsed on it by the associate. There was no *postea* drawn up, and the associate stated that none could be drawn up, as a rule for a new trial was pending:—*Held*, to be sufficient proof of the trial at *Nisi Prius*. *Rex v. Browne*, 572

PILOT.

In an action against the captain and owner of a steam-vessel for an injury resulting from the improper management of the vessel, if it appear that the pilot had the control, such pilot is not a witness for the defendant without a release, though the defendant himself was on board at the time. *Hawkins v. Finlayson*, 305

PLEA.

1. If one of two defendants plead a plea of bankruptcy *puis darrein continuance*, the plaintiff cannot, at *Nisi Prius*, confess this plea to be true, and go on with the case as to the other defendant. *Pascall v. Horsley*, 372

2. An affidavit to verify a plea *puis darrein continuance*, at the Assizes, sworn at the assize town on the commission-day of the assizes before a commissioner for taking affidavits, is not good. It should be sworn before one of the Judges of Assize. However, the Judge at *Nisi Prius* will allow it to be resworn before him. *Barllett v. Leighton*, 408

PLEADING.

See AGREEMENT, 2.—BANKRUPT, 13.
—BILL OF EXCHANGE, 9.—ESCAPE,
2.—EXECUTORS AND ADMINISTRATORS, 1.—GUARANTY, 2.—LIBEL, 7, 8, 9.—MALICIOUS ARREST, 1.—MONEY HAD AND RECEIVED, 1.—NEGLIGENCE, 1.—SERVANT, 2.

1. If a declaration aver, that in pursuance of an agreement, an action was discontinued, evidence that, since the agreement, no step had been taken in the cause, is not sufficient to support the allegation. *Fanshaw v. Heard*, 190

2. A declaration, which alleges that *A. B.* broke and entered the dwelling-house of the plaintiff, and made a disturbance therein, and broke open part of the leads and roof of the said dwelling-house, is not supported by proof of breaking an external rail fence, and trespassing on leads forming the roof of a counting-house, occupied by *A. B.*, but used as an easement to the house of the plaintiff. *Mudie v. Bell and Others*, 331

3. Form of declaration for keeping an unlicensed music-room. 471, n.

4. Form of pleading a recovery against a co-trespasser. 489, n.

5. Replication that the recovery was only part of the trespass. 491, n.

6. Form of plea by a petitioning creditor before choice of an assignee. 506, n.

7. Replication denying the act of bankruptcy. 510, n.

8. If, in an action on a bond against a surety, non-payment by the principal after a notice in writing required by the condition, be averred in the declaration, and the defendant suffer judgment by default, it is not necessary to give evidence of the notice, because the allegations of the declaration are not put in issue. If the breach be assigned under the statute on the record after judgment, *semble*, that it would be otherwise. *Barwise v. Russell*, 608

PLEDGING.

See FACTOR, 1.

POSTPONING A TRIAL.

If the trial of an indictment for felony be postponed at the instance of the prisoner, on account of the illness of a witness, the prisoner is never required to pay the costs of the prosecutor.—Where the trial of a case of felony is postponed, the Court will not make any order for the prosecutor's expenses till after the trial has actually taken place. *Rex v. Hunter*, 591

PRACTICE.

See BANKRUPT, 13.—EJECTMENT, 1.—INDICTMENT, 1, 2.—LEGITIMACY, 2.—LIBEL, 8, 9.—POSTPONING A TRIAL.—TRESPASS, 3.—WITNESS, 4.

1. If a party sue on a bill, and, after the action is commenced, another bill accepted by the same defendant, of which he is holder, is dishonoured, and he bring a second action on that:—A Judge at chambers would, on application being made, direct the two actions to be consolidated. *Oldershaw v. Tregwell*, 53

2. If the defendant's counsel take an objection, and the plaintiff's counsel answer it, and, in replying on the objection, the defendant's counsel cite a case, the plaintiff's counsel will be allowed to observe on the case so cited. *Fairlie v. Denton* and Another, Gents. two, &c. 103

3. After the Jury have had the case summed up to them, and have retired, the Court will not permit them to see a treatise on the law of the subject, even with consent of parties, as they should state their difficulty to the Judge, and receive his direction as to the law. *Burrows, Gent. v. Unwin*, 310

4. It being questionable whether a particular count in an indictment for felony was not bad on demurrer, upon an objection that would be aided by verdict, and this being pointed out to the Judge before plea pleaded—His Lordship, to save the public time, directed the trial to proceed, saying, that if the prisoner should be convicted on evidence, which, in his opinion, was applicable to this count only, he would consider it as demurred to, and allow the demurrer to be argued, putting the prisoner in the same situation as if that count had been demurred to in the first instance. *Rex v. Cordy*, 425

5. If certain parts of a book are used to refresh the memory of a witness for the plaintiff, and the defendant's counsel, in his address to the Jury, observes upon the general state of the book, and refers to other parts of it, such observations do not give the plaintiff's counsel the right of reply. *Puilen v. White*, 434

6. Plea in abatement that the promises were "made jointly with A." Replication that they were not made jointly with A. On the trial of this issue the defendant begins. *Fowler v. Coster*, 463

But see LABEL, 8 & 9. BANKRUPT

13.—TRESPASS, 3, as to the right to begin.

7. In an action for a malicious arrest, the plaintiff's counsel had closed his case, and the defendant's counsel had begun to address the Jury, when the Lord Chief Justice said, he would nonsuit, on the ground that there was no evidence of malice. The plaintiff's counsel wished to adduce further evidence, but was not permitted, the Lord Chief Justice observing, that the rule of not permitting a party to adduce fresh evidence, after such party had closed his case, had been already too much relaxed. *George v. Radford*, 464

8. The Court will direct money found upon a prisoner to be restored to him before trial, if it appear by the depositions that it is in no way material to the charge on which he is to be tried. *Rex v. Barnett*, 600

PRINCIPAL AND AGENT.

See AGENT.

An agent authorized to sell goods has (in the absence of advice to the contrary) an implied authority to receive the proceeds of such sale. *Cappel v. Thornton*, 352

PRIVILEGED COMMUNICATION.

See EVIDENCE, 6, 9.—LIBEL.

PROCESS, SERVICE OF.

See EVIDENCE, 2.

PROMISE OF MARRIAGE.

Evidence that the defendant said to the plaintiff that he would marry her in *July*, and that he would marry her sooner were it not that he had arrangements to make which would be completed by *July*, if not before; and also that he said to her once, in the month of *May*, on taking leave, "I hope in a few weeks to take you

home," is sufficient in an action for breach of promise of marriage, to support a count on a *general* promise. *Phillips v. Crutchley*, 178

PROMISSORY NOTE.

See BILL OF EXCHANGE.

1. If a person perfectly imbecile in mind is imposed upon and induced to sign a promissory note, which is drawn in an unusual form, such note is bad, even in the hands of an indorsee. *Sentance v. Pool*, 1

2. If the declaration in an action against the maker of a promissory note, state, that the defendant made it "*his own proper hand being thereon subscribed*," and it appear that the note was drawn by his son in his name and by his authority, the variance will not prevent the reading of the note, but the allegation may be rejected as surplusage. *Booth v. Grover*, 335

3. If an action be brought on a note, and for business done as an attorney, the note not tallying in its amount with the business done at the date of it, and no evidence being given as to the consideration for it:—It will be left to the Jury to say whether the note was given in satisfaction of the bill for business done up to the time of its date, or whether it was an entirely distinct transaction. *King v. Masters*, 347

PROMOTIONS, 207, 560, 628.

PROSECUTOR'S EXPENSES.

See POSTPONING A TRIAL.

PUIS DARREIN CONTINUANCE.

See PLEA 1, 2.

RAPE.

See CROSS-EXAMINATION, 2.

RELEASE.

See ANNUITY, 1.—WITNESS, 8.

SACRILEGE.

REPLEVIN.

In an action of replevin against a broker, a person who, at the time of the distress, was in partnership with such broker, but who, at the time of the trial, had ceased to be his partner, is a competent witness for him.

In such action, if it be proved that the landlord employs the attorney to defend the broker, that is sufficient evidence of the broker's authority to distrain in the absence of any written warrant. *Duncan v. Meikleham*, 172

REPLY.

See PRACTICE, 5.

ROBBERY.

1. If a gang of poachers attack a game-keeper, and leave him senseless on the ground, and one of them return and steal his money, &c. that one only can be convicted of the robbery, as it was not in pursuance of any common intent. *Rex v. Hawkins*, 392

2. *A.* had set wires in which game was caught; *B.*, a game-keeper, found them, and took the game and wires for the use of the lord of the manor; *A.* demanded them with menaces, and *B.* gave them up:—The Jury found that *A.* acted under a *bond fide* impression that the game and wires were his property:—*Held*, no robbery. *Rex v. Hall*, 409

RULE, GENERAL.

Astomoving for NEW TRIALS, 111

SACRILEGE.

If a church-tower be built higher than the church, and have a separate roof, but have no outer-door, and be only accessible from the body of the church, from which it is not separated by any partition; this tower is a part of the church, within

the meaning of the stat. 7 & 8 Geo. 4, c. 29, s. 10. *Rex v. Wheeler*, 585

SALE OF GOODS.

1. *A.* agreed to sell and *B.* to buy a ship, which *A.* undertook should be fitted similar to another ship. Before the time for completing the fittings, *B.* repudiated the contract, and refused to take the ship. Previous to this refusal, *A.* had done extras to the ship, at *B.*'s desire. *A.* did not go on with the fittings, but sold the ship, and brought his action against *B.* for the loss upon the sale. In his declaration he averred, that the ship was fitted "according to the form and effect of the agreement," and also, that it was ready for delivery at the proper time:—*Held*, that he could not recover on the special contract, nor for the extras on the count for work and labour. *Par-meter v. Burrell*, 144

SEAMAN.

1. If a seaman's claim for wages is resisted on the ground that he would not do his work, which by the ship's articles is to cause a forfeiture of wages,—it is a good answer to this defence, to shew that the refusal to work was caused by the misconduct of the captain, which went to induce the men to incur such forfeitures. If seamen have incurred a forfeiture of their wages, and in a time of distress, when the ship is a-ground, the captain call on those seamen to assist in getting her off,—this is no waiver of the forfeiture.—But if the captain continues them in their work after the peril is over, it is otherwise. *Train v. Bennett*, 3

2. By a clause in the ship's articles of a south-sea whaler, the seamen serving on board were to lose their wages if they did not return with the ship to the port of London. After serving twenty-seven months, some

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of the seamen were, with the consent of the captain, exchanged into another ship for others belonging to that ship:—*Held*, that if these seamen lost their wages under the articles, they could recover a reasonable compensation for their services, on the count for work and labour. *Hillyard v Mount*, 93

3. *Semble*, that a regulation in the seamen's articles of a merchant ship, that "every seaman committed to custody for the preservation of good order, shall forfeit his wages, together with every thing belonging to him on board the ship," is in point of law a good and proper regulation. *Rice v. Haylett*, 534

SEARCH WARRANT.

Officers went with a search warrant, and at the desire of the party gave it to him for his perusal, when he refused to return it.—*Held*, that the officers had a right to take it from him, and even to coerce his person to obtain the possession of it, provided they used no more violence than was necessary. *Rex v. Mitton*, 31

SEWERS.

1. The Jury, who are summoned by the sheriff to make the presentment before Commissioners of Sewers, should come from the body of the county, and not from the district over which the Commissioners have jurisdiction; and where the precept to the sheriff was to summon "good and lawful men of your country, and resident within the Tower Hamlets," that being the district over which the Commissioners had jurisdiction,—It was held bad; and a presentment made by that Jury and all the subsequent proceedings founded on it declared to be void. *Birkett v. Crozier*, 63

2. A Jury, impaneled to inquire and present at a Court of Commissioners of Sewers, presented, that *A.*

Y Y

was benefited by the Sewers; and he received a summons to shew cause why he should not pay. He neglected to traverse the presentment, and a distress was levied for the amount of the rate:—*Held*, at *Nisi Prius*, that these facts were a justification in an action of trespass for taking the distress, as the presentment if duly made, and not traversed, justified the Commissioners in issuing the warrant of distress.

The presentment need not contain the name of every person benefited; if it find "All Fore Street" to be benefited, that is enough to include every one having a house there; and any one so having a house might traverse such presentment, he stating in his traverse, that his property is so situated, and that he is aggrieved by the presentment.

The warrant of distress need not recite the presentment.

The defendant is not entitled to recover his treble damages, under the stat. 23 Hen. 8, c. 5, s. 12, in case of a verdict in his favour, or a non-suit, unless he claims them on the record. *Warren v. Dir*, 71

3. Form of plea of justification under the warrant of Commissioners of Sewers. 63, n.

SHARES.

1. If a person purchase certain parchments, purporting to be share certificates of a certain mine, and conceive himself to be a shareholder in such mine: if it appear that those parchments gave no legal interest in the mine, such person is not liable to pay for goods furnished for the working of such mine, unless they were furnished on his personal credit. *Vice v. Dow. Visc. Anson*, 19

SHERIFF.

See EXECUTION, 1.

1. In trover by the assignees of a bankrupt, for goods taken by the

Sheriff under an execution, it appeared that the goods were taken at about the time of year at which the Sheriffs are changed; and it was proved, that a witness, after the present cause was set down for trial, saw a form of return indorsed on the writ, which had never been returned. This form of return was signed by the defendant as Sheriff:—*Held*, to be sufficient evidence that he was the Sheriff who executed the writ; and that if the writ, when produced at the trial, has his name erased, and the name of the previous Sheriff substituted, it will be a question for the Jury, whether that substitution was made to correct a mistake, or to defeat the plaintiff.

The price at which goods are sold at a Sheriff's sale is not necessarily the measure of damages in trover, if the sale be wrongful; but when the plaintiff is an assignee, as he must have sold the goods if they had come to him, Juries are often induced to find a verdict for no more than the sum at which the Sheriff actually sold.

In an action against the Sheriff, the officer who had given him security is not a competent witness for the defence, even though the officer is indemnified by the execution creditor, and does not employ the attorney. *Whitehouse v. Atkinson*, 344

SHIP.

See SEAMAN.

1. The question, whether a ship, on a voyage from Madras to London, is not seaworthy, if she have no person on board her besides the captain who is capable of navigating her, is a question of fact for the Jury, and not a question of law to be determined by the Judge. *Clifford v. Hunter*, 16

2. If a vessel at sea is going close hauled to the wind, and another meeting her is going free, the rule of the sea is, for the latter vessel to go to leeward; and although such latter vessel may either go to leeward or

windward as she best can, yet she ought, as a general rule, to suppose that the vessel going to windward will keep her position. *Handyside v. Wilson*, 528

STAMPS.

See AGREEMENT, 2.

1. If, when a written agreement is produced, the opposite party object that it contains a greater number of words than the stamp is proper for, and call a witness who has counted the words in the counterpart: the Judge will direct the officer of the Court to count the words in the original.

Figures are to be counted as words, but an indorsement on the back, and a page of the particulars of sale, containing mere repetition of the description of the property which was described in another page of the same particulars, are not to be counted.

The Judge will not call on another cause, to allow the agreement to be sent to the Stamp Office, to be properly stamped, and the plaintiff must therefore be nonsuited. *Ld. Vis. Dudley & Ward v. Robins*, 26

2. A paper, stating that the party signing it has certain bills in his hands, which he "has to get discounted, or return on demand," does not require an agreement stamp. *Mullett v. Hutchison*, 92

3. In *assumpsit*, by the indorsee against the drawer of a bill of exchange, the defence was, that time had been given to the acceptor. To meet this defence, a copy of a paper that the defendant had promised to sign, was offered in evidence. By this the defendant consented to the plaintiff's using any means to obtain payment from the acceptor without prejudice of his right to recover from the drawer:—*Held*, that this paper did not require a stamp. *Hill v. Johnson*, 456

4. *A.* had built a house for *B.* un-

der a written contract, not admissible in evidence for want of a stamp. *A.* sued *B.* for the value of certain works about the house, alleging them to be extras, and not included in the contract:—*Held*, that the Court could not look at the unstamped contract to ascertain whether those works were included in it or not, and that the plaintiff must be nonsuited. *Vincent v. Cole*, 481

SURVEYOR OF HIGHWAYS.

1. In an action on the stat. 13 Geo. 3, c. 78, s. 48, against surveyors of highways, to recover double the amount of a sum not paid over by them to their successors, a notice of action was given, stating that an action would be brought against them, for that they had in their hands a balance of 353*l.* 19*s.* 4*d.* At the trial, it appeared that only 60*l.* 3*s.* 3*d.* was in their hands:—*Held*, that this notice was not sufficient, and that the plaintiff could not recover the double amount. *Heudebourck v. Langton*, 566

2. Whether a succeeding surveyor of the highways can recover a balance in the hands of the two surveyors who preceded him, in an action for money had and received to his use—*Quære*: but held, that if, in that form of action against both, it be shewn that the money came to the hands of one only, the plaintiff must be nonsuited, although it be also shewn that the defendants were jointly surveyors. *Ibid.*

3. If several parishioners in vestry sign a resolution in the vestry minute-book, stating that they approve of an action brought by the surveyor of the highways against *A.*, and that they do thereby guarantee to him all legal expenses that are or may be incurred by him in prosecuting that suit; this binds them personally, and will render each person signing it incompetent to be a witness on the trial of that action. *Ibid.*

SURETY.

See BOND, 8.—CONTRIBUTION, 1.

SURGEON.

See MANSLAUGHTER, 3, 4.

Admission as a member of the Royal College of Surgeons does not entitle a man, since the stat. 55 Geo. 3, c. 194, to charge for medicines administered by him while attending a patient suffering under *typhus fever*.

But a surgeon may charge for medicine administered in a surgical case, where the medicine is subservient and subordinate to the discharge of his duty as a surgeon. *Allison v. Haydon*, 246

TALES.

Held at *Nisi Prius*, that, in a special jury cause, the plaintiff's counsel cannot have a tales without the consent of the counsel for the defendant. *Museum, British v. White*, 289

TAXES.

See BOND, 2.

TENDER.

See ASSUMPSIT, 1.

If an attorney send a letter to demand payment, and the debtor make a tender to him, that is a good tender, unless the attorney disclaims his authority at the time; and, if the attorney be absent, he is bound by the acts of those whom he allows to represent him at his office. Therefore, after such a letter being sent, a tender to the clerk of the attorney at his office (the attorney being absent) is good. *Wilmot v. Smith*, 453

TRAVERSE.

If a party has been held to bail, or committed for more than twenty days, on a charge of *felony*, and the Grand Jury ignore the bill for the *felony*, and find a bill for a *misdemeanor*, in attempting it; the party is entitled to traverse. *Rex v. James*, 222

TRESPASS.

TREATING.

See ELECTION, 2.

TRESPASS.

See EXECUTION, 1.—LANDLORD AND TENANT, 4.

1. If a person who keeps hounds and a hunting establishment, receive notice not to trespass on the lands of *A.*, and after this his hounds go out, followed by a number of gentlemen who go upon the lands of *A.*, the owner of the hounds is answerable for all the damage they do, though he himself forbear to go on the lands, unless he distinctly desires the gentlemen so out with his hounds *not* to go on those lands. If a stag, hunted by the hounds of *B.* run into the barn of *A.*, *B.* and his servants have no right to enter the barn to take his stag; and if they do so they are trespassers. *Baker v. Berkeley, Esq.*, 32

2. The 136th section of the 57 Geo. 3, c. xxix. requiring twenty-one days' notice of action, applies to the case of an action brought against a contractor for the removal of dust, &c. appointed by the Commissioners of Sewers for the city of London, for an alleged trespass in seizing a cart supposed to contain dust, and assaulting and imprisoning the driver. *Breedon v. Murphy*, 574

3. In trespass, where there are special pleas of justification, but no plea of the general issue, the defendant is entitled to begin, although the declaration alleges special damage. *Fish v. Travers*, 578

5. If there be a joint action of trespass against six defendants, and the plaintiff prove a joint-trespass committed by all, and then go on to prove another act of trespass by three of them, expecting to connect the other three with this also, but fail in so doing, the latter three are entitled to be acquitted before the defence is opened, as the plaintiff must be taken to have elected to waive the joint-

trespass, and to have gone on as against those three for the second act of trespass only. *Wynne v. Anderson*, 596

5. If an action be brought against six for a single act of trespass, and the plaintiff by his evidence only fix three of them, the Judge will not direct an acquittal of the other three till all the evidence for the defence is gone through. *Ibid.*

TROVER.

See ATTACHMENT, 1.—CONVERSION, 1.—GOODS SOLD, 2.—MASTER AND SERVANT, 1.

A party cannot maintain trover against a constable for a wrongful taking of goods under a Justice's warrant, without joining the Justice as a defendant, if perusal and copy of the warrant have been given under the stat. 24 Geo. 2, c. 44, s. 6. *Lynons v. Golding*, 586

TRUSTEES.

See TURNPIKE, 2.

TURNPIKE.

1. If the plaintiff subpoena the defendant's attorney to produce books, the latter is not entitled to receive any thing from the plaintiff for expenses or loss of time in attending as a witness. *Pritchard v. Walker*, 212

2. If a person is named in a turnpike-act, as one of the trustees of a turnpike road, and has acted as such, and been recognized as a trustee by the plaintiff, the Judge, at the trial of a cause, in which the goodness of his title to act is not the matter directly in issue, will take him to be a good trustee, and will not allow evidence to be given on the part of the plaintiff, to shew that the person has not taken the oath prescribed to be taken by trustees of roads before they act as such. *Ibid*

USE AND OCCUPATION.

See LANDLORD AND TENANT, 5.

VARIANCE.

See AGREEMENT, 7.—BOND, 2.—COIN, 1.—MALICIOUS PROSECUTION.—PROMISE OF MARRIAGE, 1.

1. On an indictment for perjury in a cause at *Nisi Prius*, it is no variance that the *Nisi Prius* record states the trial to have been on a day different from that stated in the indictment.

If the indictment state the trial to have been before one of the Judges (who in fact sat for the Lord Chief Justice), and the *Nisi Prius* record state the trial to have been before the Lord Chief Justice, *semble*, that this is no variance.

If the indictment, in setting out the substance of oral evidence charged to be false, put "*Mr.*" for "*Mister*," and "*Mrs.*" for "*Mistress*;" this is no variance, though it should appear that the witness said "*Mister*" and "*Mistress*," and not "*Mr.*" and "*Mrs.*" *Rex v. Coppard*, 59

2. The declaration in an action on a bail bond, stated the issuing from the Common Pleas of a writ for the arrest of the principal, by which the sheriff was commanded to have his body, "*before the justices of our said lord the king, at Westminster*," &c., to answer &c., and also, that he might answer &c., "*according to the custom of his said Majesty's Court*," &c. and alleged the condition of the bond to be for the appearance, of the principal, "*according to the exigency of the said writ in the said Court*," &c. and also to answer, &c., "*according to the custom of his said Majesty's Court of Common Bench*." The condition, as proved at the trial, was for the appearance of the principal, *before our said lord the king at Westminster*, &c., to answer &c., and also to answer "*according to the custom of the King's Court of Common Bench*." Held, that there was not any material variance. *Crofts v. Stockley*, 281

3. *A.* proposed to *B.* to give him a certain sum for a *thirty-one years lease* of a house, with possession on the *25th of July*, and a definitive answer was to be given within six weeks. *B.*, about three weeks after the proposal, wrote that he accepted it, and would give possession on the *1st of August*. *A.* in a few days wrote, withdrawing his proposal. Some time after this, and just before the end of the six weeks, *B.* wrote that it was by mistake he had offered possession on the *1st of August*, and stating that he was ready to give it according to the proposal:—*Held*, at *Nisi Prius*, that the letter of *B.* offering possession in August, was not an acceptance of *A.*'s proposal, and that *A.* had a right afterwards to retract his offer; and having done so, the second letter of *B.*, amending the offer of possession, was too late.

The declaration in the first and third counts alleged the possession of the whole interest by *B.*, and in the second, the possession of a contract for it. It appeared that there had been some conversation between *B.* and the owner of the freehold, about granting a thirty-two years' lease, but there was no written contract, nor did it appear that there was any positive verbal agreement upon the subject. The only interest which *B.* had in the premises, at the time of the proposal and retraction, was a ten years' interest:—*Held*, both at *Nisi Prius* and in Banc, that there was a material variance between the declaration and the proof. *Routledge v. Grant*, 267

4. In replevin, the defendant, in his avowry, stated, that the distress was for rent arrear, and that the plaintiff held the lands on certain terms. However, on the plaintiff's lease being put in, it appeared that he held on other and different terms:—*Held*, that this variance was not amendable under the stat. 9 Geo. 4, c. 15:—*Held* also, that that act only applies to cases where some particular writ-

ten instrument is professed to be set out or recited in the pleading. *Ryder v. Malbon*, 594

VENDOR AND VENDEE.

See AGREEMENT, 1.

The particulars of sale at a public auction described two houses as Nos. 3 and 4, and stated, that the taxes of No. 3 were paid by the tenant. The houses ought to have been described as Nos. 2 and 3, but the names of the occupiers were correct; and it should have been stated that the taxes of No. 3 were farmed by the landlord. The houses, Nos. 2 and 4, were of the same rate: but No. 4 was in the best state of repair:—*Held*, that these misdescriptions were not cured by a condition, which provided, that if any error or mis-statement should be found in the particular, it should not vitiate the sale. *Leach v. Mullett and Another*, 115

WARRANTY.

See INSURANCE, 1.

WITNESS.

See ADMISSION, 1.—BAIL, 2.—BILL OF EXCHANGE, 7.—CROSS-EXAMINATION, 1.—FORGERY.—PILOT.—SHERIFF.—SURVEYOR OF HIGHWAYS, 3.—TURNPIKE, 1.

1. If a party having failed, and assigned his property to trustees, for the benefit of his creditors, be sued for work done, a creditor of such party is not a competent witness in his favor if he has not received 20s. in the pound on his debt, and swears that it is doubtful whether the estate will produce so much. *Crerer v. Sodo*, 10

2. A witness who is subpoenaed in London in August, to attend a trial at the adjourned sittings in October, and who is, at the time of the service, on the eve of his departure for the continent, is entitled to his expenses in coming from the continent to at-

tend the trial. *Vice v. Dow. Visc. Anson,* 19

3. A. let a house to the plaintiff, who underlet to the defendant; and on the plaintiff becoming bankrupt, the assignees consented to an action for use and occupation being brought by A. in the plaintiff's name. A. died, and his executor directed the plaintiff's attorney to go on with the action:—*Held*, that the executor was not a competent witness on the part of the plaintiff. *Parker v. Vincent,* 38

4. A witness from the country subpoenaed there by the defendant, without receiving sufficient for his expenses, and afterwards, when in London, subpoenaed by the plaintiff, and called by him on the trial, is bound to give his evidence both in chief and on cross-examination, and must seek to obtain his expenses in some other way than by objecting to be examined. *Edmonds v. Pearson,* 113

4. The general rule is, that no paper can be put into the hand of a witness, to refresh his memory, which is not of his own hand-writing; therefore, if he is asked whether he has not been imprisoned in France, the counsel asking this cannot put into his hand an authenticated copy of the sentence of the French Court.

If, in an action on a bill, it has been opened, that the bill in question, at the same time with another bill, was usuriously discounted by the plaintiff, and after a *prima facie* case of usury made out, a witness, who is called to disprove it, is asked as to something he has said respecting a trial relative to the other bill, this is not a matter so far collateral, that the other side may not call a witness to contradict him as to what he said.

If in an action on a bill, the plaintiff's counsel make out a *prima facie* case, and the defendant's counsel proves a case of usury, and, after the plaintiff has

called a witness in reply to deny the usury, a witness be called to contradict the plaintiff's witness in reply; the defendant's counsel is entitled to observe on the plaintiff's evidence in reply, and on the contradiction; and the plaintiff's counsel then has a general reply. *Meagoe v. Simmons,* 75

5. Though the mode of examining a deaf and dumb witness by means of signs made with the fingers, is a mode receivable even in capital cases; yet where the witness can write, *semble*, that it would be better to make him write his answers to the questions put to him. *Morrison and Another v. Lennard,* 127

6. The party who was defendant in a suit, cannot, in an action against the sheriff for a false return to a *fi. fa.* issued in that suit, be called as a witness for the defendant, to shew circumstances from which the jury might infer that no debt was actually due by him. *Davis v. Cromder and Another,* 169

7. A woman who lives in a state of concubinage with a man, and passes as his wife, is a competent witness for him in an action brought against him, and is not under the same incapacity of giving evidence in his favour, as she would be if she were really his wife. *Batthews v. Galindo,* 238

8. In an action of trover for a barge, brought against barge builders, who claimed under a person named Wilson, who had put it into their custody for repairs, and who made title under a purchase from a person named Buckman, who was alleged by the plaintiff to have previously sold to him.—Buckman was called as a witness on the part of the defendants:—*Held*, that a release from Wilson was sufficient to render him competent, and that a release from the defendants was unnecessary. *Radburn v. Morris,* 254

9. To dispense with the necessity

of calling the subscribing witness to a deed, it is sufficient to shew that he expressed an intention of leaving the country, that he had reason for doing so to avoid a criminal charge, and that his relations have not seen him since he expressed his intention of going.

It is not necessary, in the absence of the subscribing witness, to prove the hand-writing of the party executing the deed; it is enough to prove the hand-writing of the witness. *Kay, Bart. v. Brookman*, 555

10. *Semble*, that it would be a good practice in the administration of justice, to keep all the witnesses out of

court at *Nisi Prius*, except the person under examination. *Taylor v. Lawson*, 543

11. The wife of the defendant in a suit cannot be examined as a witness for the plaintiff without the defendant's consent, although it appear that he married her after she was actually subpoenaed to give her evidence in the cause. *Pedley v. Wellesley*, 558

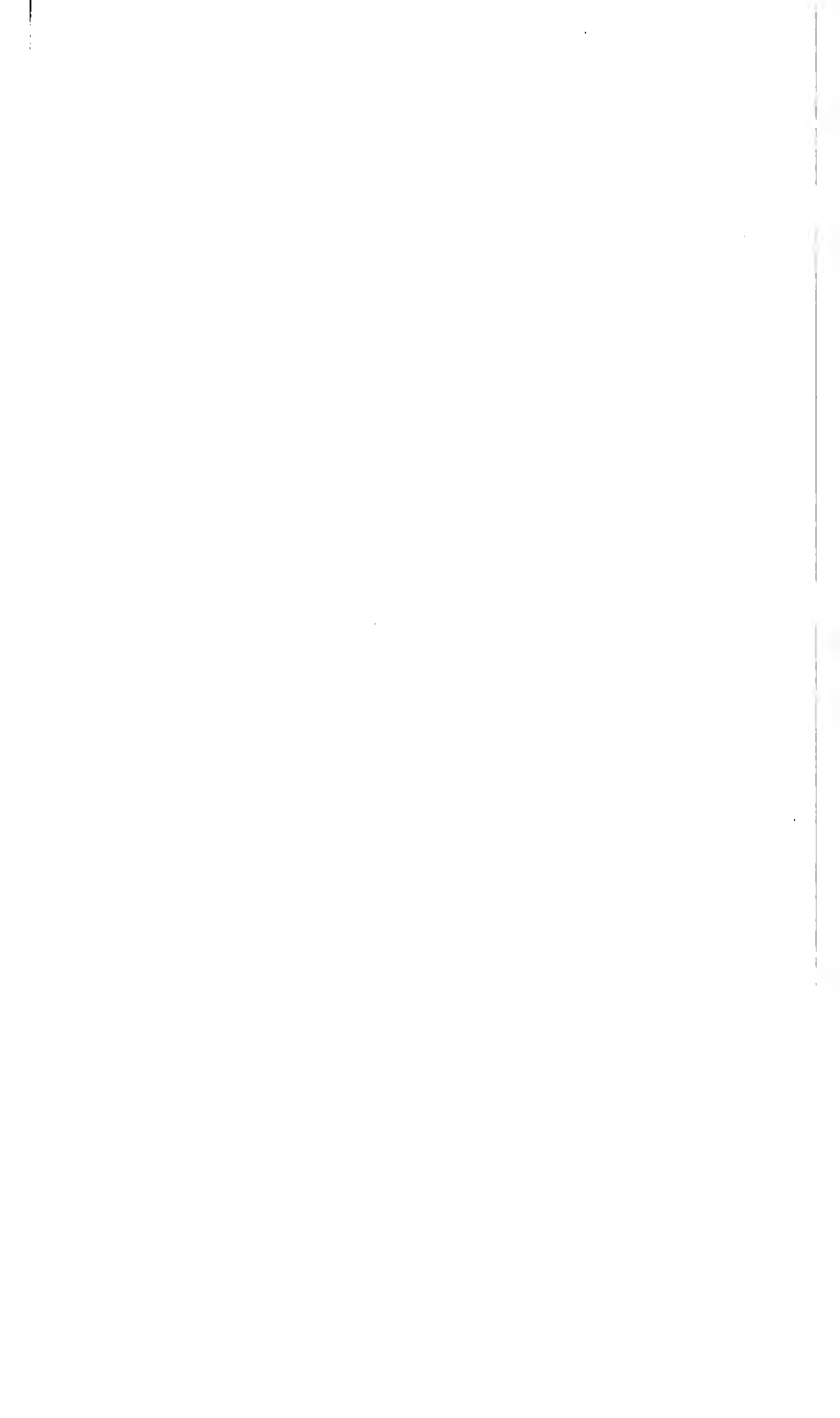
12. Witnesses may be asked questions which tend merely to degrade them in their character, but not questions the answers to which may subject them to a prosecution for a crime. *Cundell v. Pratt*, 240, n.

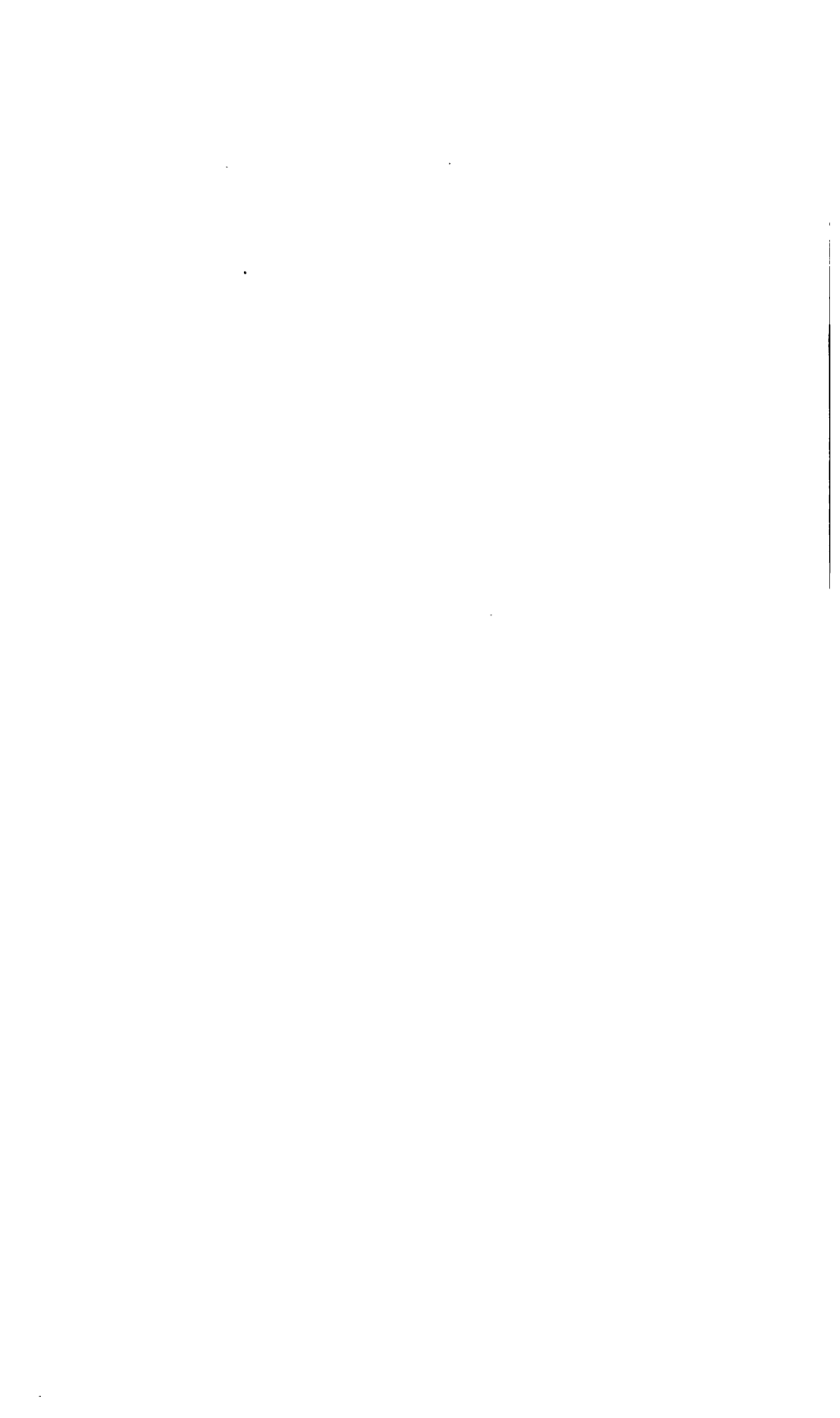
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